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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

321 STUDIOS, also known as 321 Studio,  
LLC,

Plaintiff,

v.

METRO-GOLDWYN-MAYER STUDIOS  
INC.; et al.

Defendants.

METRO-GOLDWYN-MAYER STUDIOS  
INC. et al.

Counterclaimants,

v.

321 STUDIOS et al.,

Counterclaim Defendants.

Case No.: C-02-1955 SI

**REPLY MEMORANDUM OF POINTS  
AND AUTHORITIES OF DEFENDANTS  
AND COUNTERCLAIMANTS IN  
SUPPORT OF MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

Date: April 25, 2003

Time: 9:00 a.m.

Courtroom: 10, 19th Floor

Judge: Hon. Susan Illston

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**Preliminary Statement**

Although it is difficult to tell from 321's Opposition, this is *not* an action for copyright infringement, and it is *not* about what 321's customers may do with its products. This *is* an action concerning 321's liability for trafficking in the DVD Circumvention Software. The DMCA makes it a violation to "offer to the public" or to "traffic" in the DVD Circumvention Software. Thus, 321's liability arises before anybody buys or uses its products. 321 is a commercial enterprise whose only business is the manufacture, sale, and distribution of unlawful circumvention products, which it began selling after one court expressly held that an equivalent product violated the DMCA, and which it continues to "improve" and sell to the public.

321, and its expert, do not dispute any relevant aspect of the Studios' description of how the DVD Circumvention Software works or what it accomplishes. If anything, the Opposition confirms that with respect to the essential issue in this case – circumvention – there are no material facts in dispute. 321 is liable under both section 1201(a) (access protection) and section 1201(b) (copy protection). For that reason, 321's Opposition is but a (lengthy) attempt to deflect the Court from this core issue. In the process, 321 seeks a third bite at the apple, recycling arguments made (sometimes verbatim and by the same counsel or amicus) and rejected by the courts in Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2nd Cir. 2001) and United States v. Elcom, Ltd., 203 F. Supp. 2d 1111 (N.D. Cal. 2002).<sup>1</sup>

First, 321 contends it does not violate the DMCA, based on completely irrelevant supposed uses of its circumvention software by its users, and tortured and unsupported "statutory constructions" which contradict the express language of the DMCA and which, if followed, would nullify the statute (and its intended protections). Next, 321 asserts constitutional

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<sup>1</sup> 321 tries to distinguish Corley and Elcom in one sentence, arguing that the technologies at issue there, unlike 321's technology, "facilitated the instant redistribution of copyrighted content over the internet." Opp. at 7. This attempt fails because the DMCA's prohibitions are not based on whether the prohibited circumvention technology facilitates Internet copying and distribution or DVD copying and distribution. 321's argument also fails both because 321's DVD Circumvention Software does facilitate Internet distribution (fn. 8, infra), and, in any event, the conduct of those using the software is irrelevant to 321's liability (section II, infra).

arguments -- again largely focusing on irrelevant claimed uses of its consumers -- which confuse and conflate First Amendment rights (which it lacks standing to raise) with fair use (a limited affirmative defense not applicable to the trafficking provisions of the DMCA), and which impermissibly attempt to elevate the making of complete copies of copyrighted works to an absolute free speech right. In doing so, 321 ignores that the DMCA regulates function not speech, is content neutral, is designed to protect the significant governmental interest of “[p]romoting the continued growth and development of electronic commerce,” and was properly enacted under the Commerce Clause. Finally, 321 briefly throws in an inapt misuse defense, and incongruously claims that the Studios (the intended beneficiaries of the DMCA and which 321 sued for declaratory relief) lack standing and have not been irreparably harmed by 321’s unlawful conduct.

In the end, the DVD Circumvention Software is a burglar's tool. The analogies to its products that 321 decries and labels as the creation of the Studios (Opp. at 7) are in fact the analyses of the United States Court of Appeals for the Second Circuit, the United States Congress, and the pre-eminent treatise on U.S. copyright law:

“In its basic function, it is like a skeleton key that can open a locked door, a combination that can open a safe, or a device that can neutralize the security device attached to a store’s products.”  
Corley, 273 F.3d at 453.

“The act of circumventing a technological protection measure put in place by a copyright owner to control access to a copyrighted work is the electronic equivalent of breaking into a locked room in order to obtain a copy of a book.”  
H.R. Rep. No. 105-551(I), at 17 (1998).

“The basic provision . . . is equivalent to breaking into a castle.”  
3 M. & D. Nimmer, Nimmer On Copyright, § 12A.03[D][1], at 12A-33 (2002).

The Studios’ motion should be granted.

**Argument**

**I. 321'S TRAFFICKING IN THE DVD CIRCUMVENTION SOFTWARE VIOLATES BOTH SECTIONS 1201(a) AND 1201(b) OF THE DMCA**

CSS is an integrated system that protects against both access and copying. Declaration of Robert Schumann ("Schumann Decl."), ¶¶ 12-20. 321 is liable, and the Studios are entitled to summary judgment, if 321 violated *either* the access-circumvention provisions of Section 1201(a)(2) *or* the copy-control provisions of Section 1201(b). See Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 316 n.133 (S.D.N.Y. 2000) (noting that the two sections "are very similar," and finding liability under 1201(a) obviated the need to consider 1201(b)). The undisputed facts establish that 321 has violated both anti-circumvention provisions.

321 *admits* that "CSS is an access control system" (Opp. at 2), and that the DVD Circumvention Software circumvents CSS encryption to gain access to a DVD:

"DVD-X-Copy reads the data on the DVD drive, *decodes it* as necessary, and then uses the data to create a backup copy of the DVD. DVD-X-Copy can be used to create backup copies of DVDs *encoded with* or without CSS. . . . In order to read CSS-encoded data, DVD-X-Copy uses a well-known and publicly available CSS key. DVD-X-Copy then uses the well-known CSS algorithm to *decode the data*, and in this respect, DVD-X-Copy works just like any licensed DVD player." Opp. at 4 (emphasis added).

Similarly, 321 admits that "§ 1201(a)(2) applies to DVD Copy Code, because CSS controls access to DVDs. . . . CSS prevents unauthorized access to a DVD by requiring a key in order to view the data contained on the DVD. . . . Thus, any circumvention of CSS raises issues under § 1201(a), which governs unauthorized access" (Opp. at 8; Touretzky Decl. ¶¶ 10-14); and that "the ability to unlock CSS is just one feature of DVD Copy Code" (Opp. at 18). See also First Amended Complaint ¶ 23 ("Most DVDs manufactured, distributed or sold by the defendants are recorded onto the DVD in a scrambled format in which the data is encrypted in order to prevent unauthorized access. . . ."); ¶ 29; Mayer Decl. Ex. E (message board posting from 321 programmer admitting that "yes, the software has to descramble the contents of the DVD in order to do anything useful with it"). 321's attempt to avoid liability by arguing that its DVD Circumvention Software "works just like any licensed DVD player," necessarily admits this

dispositive fact – **321 circumvents the CSS protections employed by the Studios** -- while omitting the crucial qualifying facts that **321 does not have a license, and its product is not a licensed DVD player**. 321’s admission that it sells software that evades an access control technology establishes its liability under Section 1201(a)(2).

The undisputed facts also establish that 321 is liable under Section 1201(b). CSS undeniably is a copy control system. Through its multi-layered protections, including an authentication process, an encryption process, and strict license requirements, its very purpose is to prevent the unauthorized reproduction of CSS-protected DVDs. Again, 321 admits that it circumvents the copy protection afforded by CSS, and permits an unencrypted copy of a DVD to be made. See Moore Decl. ¶ 6 (“DVD X Copy reads the data on the DVD drive, decodes it as necessary, and then uses the data to create a backup copy of the DVD. The data is read by the DVD drive, decrypted by the software . . .”); First Amended Complaint ¶ 26 (“DVD Copy Plus [creates] a copy of the contents of the DVD”); ¶ 28 (“DVD X Copy allows a user to make a DVD copy of a DVD video . . .”); Mayer Decl., Ex. D. (321’s chief executive: “People are already making DVD Copies. . . . What we’re doing is bringing it to the mass market”). Even the very names 321 gives to its products (“DVD *Copy* Plus,” “DVD-X-*Copy*”) reflect their intended purpose and effect: to copy CSS-protected DVDs.

#### A. Access Circumvention

Section 1201(a)(2) prohibits:

- (1) trafficking in
- (2) any component or part of a technology or product that
- (3) either:
  - is primarily designed;
  - has no other commercially significant value other than; or
  - is marketed;
- (4) to circumvent a technological measure that
- (5) effectively controls access to a copyrighted work.

In its brief argument attempting to avoid Section 1201(a) liability, 321 makes only two points: First, it contends half-heartedly that the DVD Circumvention Software was not “primarily designed” to circumvent and/or has commercially significant value other than to

1 circumvent. Opp. at 18-19. Second, it asserts that the DVD Circumvention Software does not  
 2 “circumvent a technological measure” because the section 1201(a)(3)(A) definition of  
 3 “circumvent a technological measure” includes the phrase “without the authority of the copyright  
 4 owner,” and “*any* purchaser of a DVD has the right to *access* its contents.” Opp. at 8-9  
 5 (emphasis in original). Both of these arguments rely on fundamental misreadings of the plain  
 6 text of section 1201.

7 **1. Primarily Designed, Marketed or Only Commercial Valuable for**  
 8 **Circumvention**

9 Section 1201(a)(2) provides three alternative grounds for liability. A technology is  
 10 unlawful if it: (A) is “primarily designed” to circumvent; (B) has “only limited commercially  
 11 significant purpose or use other than to circumvent”; or (C) is clearly marketed for use in  
 12 circumventing. 17 U.S.C. §§ 1201(a)(2)(A)-(C). Any one element is sufficient. See H.R. Rep.  
 13 105-551 (II), at 39 (“for a technology, product, service, device, component, or part thereof to be  
 14 prohibited under this subsection, *one of three* conditions must be met”) (emphasis added); S.  
 15 Rep. 105-190, at 11, n.19 (“even if a device does not have circumvention as its primary purpose  
 16 or design, that is, that it does not fall within the prohibition of section 1201(a)(2)(A), the device  
 17 would still be illegal if it fell within the prohibitions of *either* 1201(a)(2)(B) and (C)”) (emphasis  
 18 in original).

19 The DVD Circumvention Software qualifies under all three subdivisions. By definition,  
 20 the unlawful “part” of the DVD Circumvention Software -- the part that allows for the  
 21 circumvention of CSS protection -- not only was “primarily” designed to circumvent, *that is all*  
 22 *it was designed to do*, and that is all that it does. See Reimerdes, 111 F. Supp. 2d at 319  
 23 (“DeCSS was created solely for the purpose of decrypting CSS – that is all it does.”).<sup>2</sup> The CSS-

24 <sup>2</sup> 321’s DVD Copy Plus utilizes a program called “SmartRipper.” SmartRipper is built upon,  
 25 and operates in a manner nearly identical to, deCSS. See Schumann Decl. ¶¶ 26-30. 321’s  
 26 founder and President, Robert Moore, a “software engineer,” clearly was aware of the virtual  
 27 equivalence of the two programs. See Moore Decl. ¶ 1. DVD X Copy utilizes a “proprietary”  
 28 program to accomplish the same result. See Schumann Decl. ¶¶ 32, 33; see also Mayer Decl.,  
 Ex. E (321 programmer’s admission that “[t]he dispute between whether or not DVD X Copy  
 uses deCSS is more of an issue of semantics than substance”).

1 circumvention component of the DVD Circumvention Software also has no commercial value or  
 2 significance at all other than to circumvent CSS, and 321 has not even attempted to articulate  
 3 one. Finally, 321 expressly markets its products as a fast, easy way to copy CSS-protected  
 4 DVDs. Mayer Decl., Exs. A-C. (For example, advertising on 321's web site promises that  
 5 DVD-X-Copy will make "PERFECT COPIES OF YOUR DVDS! . . . IN ABOUT AN HOUR.")

6 These obvious and indisputable facts force 321 to argue (while at the same time  
 7 admitting) "[t]he ability to unlock CSS is just one feature of DVD Copy Code," in that the DVD  
 8 Circumvention Software also can be used to copy DVDs not protected by CSS, such as home  
 9 videos. Opp. at 18. However, 321's admission that *a part* of the DVD Circumvention Software  
 10 circumvents CSS renders 321 liable. Both section 1201(a)(2) and section 1201(b)(1) expressly  
 11 provide liability for a circumvention "technology, product, service, device, *component or part*  
 12 *thereof*." (Emphasis added). Thus, when an unlawful circumvention technology device is  
 13 incorporated into a larger overall "product" or "device," § 1201 expressly creates liability. For  
 14 example, a clock-radio that included the DVD Circumvention Software would violate § 1201. It  
 15 is the "component" or "part" of the DVD Circumvention Software that circumvents CSS-  
 16 protection to which the Studios object; the other aspects are irrelevant. If 321 only made DVD  
 17 copying software that did not circumvent CSS-protection (like numerous DVD "burning"  
 18 programs) (see Schumann Decl. ¶ 37) and thus only copied non-CSS protected works (like the  
 19 wedding videos or home movies referred to by some of its declarants), there would be no section  
 20 1201 liability. But it does not: the DVD Circumvention Software is expressly designed to gain  
 21 access to and copy CSS-encoded DVDs.<sup>3</sup>

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 25 <sup>3</sup> The fact that other components of the DVD Circumvention Software may have separate  
 26 functions does not implicate the "substantial non-infringing use" doctrine applicable to the law  
 27 of contributory infringement articulated by Sony Corp. of America v. Universal City Studios,  
 28 Inc., 464 U.S. 417 (1984). See Reimerdes, 111 F. Supp. 2d at 323 & n.170 ("Congress explicitly  
 noted that Section 1201 does not incorporate Sony. . . . The Sony test of 'capab[ility] of  
 substantial non-infringing uses.' . . . is not part of this legislation.") (citation omitted).



## 2. “Circumvent a Technological Measure”

To “circumvent a technological measure” is expressly and broadly defined as “to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner.” 17 U.S.C. § 1201(a)(3)(A). 321 does not dispute that its software decrypts CSS. Rather, 321’s entire argument that it does not circumvent a technological measure rests on the indefensible position that people who buy DVDs have “the authority of the copyright holder” to access the content of the DVD, *i.e.*, to watch it. Opp. at 8-9. This argument intentionally confuses the “authority” of consumers to *view* CSS-encrypted DVDs on licensed DVD players and the (lack of) “authority” of “traffickers” to *decrypt or bypass* CSS protection. The “authority of the copyright holder” that is necessary, and that 321 admits it lacks, is the authority to circumvent CSS protection. Section 1201(a)(3)(A) “exempts from liability those who would ‘decrypt’ an encrypted DVD with the authority of a copyright owner, not those who would ‘view’ a DVD with the authority of a copyright owner.” Corley, 273 F.3d at 444. See also Reimerdes, 111 F. Supp. 2d at 294 n. 137 (“[t]he DMCA proscribes trafficking in technology that decrypts or avoids an access control measure without the copyright holder consenting to the decryption or avoidance”). Licensed DVD players have “the authority of the copyright holder” *to decrypt CSS*; 321’s DVD Circumvention Software does not.<sup>4</sup> 321’s argument results in an absurdity. Obviously those who manufacture and sell CSS-encrypted DVDs want their purchasers to be able to obtain lawful access to them. If that was enough to grant the “authority of the copyright holder” to traffic in circumvention technology, section 1201(a)(2) would be meaningless.

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<sup>4</sup> Thus, 321’s claim that the DVD Circumvention Software works the same way that licensed and authorized DVD hardware devices do, omits the crucial distinction that the authorized hardware manufacturers are licensed and have been issued a key “with the authority of the copyright holder” to decrypt CSS. In exchange, licensed DVD players must adhere to strict prohibitions on copying, or allowing the copying, of the decrypted DVD.



1           **B.       Copy Circumvention**

2           The first three elements of section 1201(b)(1) are the same as discussed above with  
3           respect to section 1201(a)(2); the last two elements are slightly different. Section 1201(b)(1)  
4           prohibits:

- 5           (1) trafficking in  
6           (2) any component or part of a technology that  
7           (3) either:
- 8               • is primarily designed;
  - 9               • has no other commercially significant value other than; or
  - 10              • is marketed;
- 11           (4) to circumvent a protection afforded by a technological measure; that  
12           (5) effectively protects a right of a copyright owner under this title in a work or a portion  
13           thereof.

14           321 argues that the DVD Circumvention Software does not violate section 1201(b)(1)  
15           because *its software* does not “violate a right of a copyright holder.” Opp. at 10. But that is not  
16           the test. Section 1201(b) prohibits trafficking in technology *that circumvents a technological*  
17           *measure* that protects the right of a copyright holder, as the DVD Circumvention Software  
18           indisputably does. Once again, the DVD Circumvention Software satisfies each element of the  
19           statute. There is no dispute that 321 “traffics” in the DVD Circumvention Software, and the  
20           “part” of the DVD Circumvention Software that decrypts CSS is designed and marketed solely  
21           for that purpose. As to the last two elements, 321 argues that CSS does not protect a right of a  
22           copyright holder because it is not a copy-control measure, and that, in any event, the DVD  
23           Circumvention Software does not circumvent the CSS encryption.

24           CSS indisputably *is* a copy-control measure for two reasons. First, as discussed above,  
25           321 admits that CSS controls access to encrypted DVDs. Because, as 321 admits, a CSS-  
26           encrypted DVD cannot be copied until it is accessed (Touretzky Decl. ¶¶ 15-17), and cannot be  
27           copied except by a licensed DVD player, CSS controls copying. Of course, the ultimate purpose  
28           of CSS is to prevent copying of DVDs.

1 Second, 321's argument that CSS is not a copy-control measure is based solely on its  
 2 statement that "CSS does not prevent the copying of the encrypted data contained on the DVD."  
 3 Opp. at 8.<sup>5</sup> But 321 admits that the "encrypted data" that can be copied is useless.

4 "[A]lthough it is possible to make a copy of a CSS encrypted  
 5 DVD, such a copy is missing the CSS 'lock.' Because *the copy* is  
 6 missing the lock, it cannot be opened by the CSS key, and cannot  
 be accessed or viewed. *So although CSS allows for copying, that  
 copying is not particularly useful.*" Opp. at 3 (emphasis added).

7 This admission destroys 321's argument. Since virtually no one would want an unusable  
 8 copy of a DVD, a technology, like CSS, that *prevents* the making of *usable* copies but *allows*  
 9 only the making of *unusable* copies clearly qualifies as a "technological measure that effectively  
 10 protects a right of a copyright owner." That phrase is defined in section 1201(b)(2)(B) as a  
 11 measure that "prevents, restricts, or otherwise limits the exercise of a right of a copyright owner  
 12 under this title." Because, as 321 admits, CSS prevents the making of a usable copy of an  
 13 encrypted DVD, CSS *at a minimum* "restricts" and "limits" copying to unusable copies. See 17  
 14 U.S.C. § 101 (defining copies as "material objects . . . in which a work is fixed . . . *and from*  
 15 *which the work can be perceived*") (emphasis added).

16 This common sense interpretation – that preventing copying means restricting making  
 17 usable copies – is supported by a venerable copyright principle: an infringing copy is one which  
 18 the "ordinary person" will see (or hear) as having substantially similar expression to the original;  
 19 it is not a jumbled version bearing no observable similarity to the original. See, e.g., Harold  
 20 Lloyd Corp. v. Witwer, 65 F.2d 1, 18 (9th Cir. 1933).

21 This conclusion is reinforced by the DMCA's internal structure. Section 1201(k)  
 22 expressly refers to "automatic gain control" and "colorstripe" as "copy control" technologies.  
 23 These technologies are employed by VHS format analog video cassette recorders "to prevent the  
 24 making of *a viewable copy* of a . . . prerecorded tape or disc containing one or more motion  
 25 pictures or audiovisual works." H.R. Rep. 105-796 at 70 (emphasis added). These

26  
 27 <sup>5</sup> As noted above, in order to do even that, the locking mechanism of CSS, which controls access  
 28 to the DVD, must be circumvented. Schumann Decl. ¶ 14(a).

1 technologies, just as CSS, allow “copying” in the hyper-technical sense argued by 321, but all  
 2 are, by definition, copy-control technologies because the copies made are useless to (i.e., not  
 3 “viewable” by)<sup>6</sup> the consumer. “[D]evices that defeat these technologies . . . should be seen for  
 4 what they are – circumvention devices prohibited by this legislation.” Id. at 68.<sup>7</sup>

5 321 next argues that the DVD Circumvention Software does not circumvent CSS because  
 6 it does not “avoid” or “bypass” the protections afforded by CSS in that “it simply uses the  
 7 authorized key to unlock the encryption.” Opp. at 16. This argument fails because it is  
 8 undisputed that 321 does not have the authority to use the “authorized key.” Indeed that is what  
 9 this case about. 321's admission that it "unlocks the encryption" without authority is an  
 10 admission that the DVD Circumvention software "avoids" and "bypasses" CSS.

11 321 similarly argues that the DVD Circumvention Software does not circumvent CSS  
 12 because it does not “remove, deactivate or otherwise impair” the protection afforded by CSS,  
 13 because “the original DVD is completely unchanged, and its encryption remains intact.” Opp. at  
 14 16. But, because the DVD Circumvention Software “avoids” and “bypasses” CSS, as discussed  
 15 above, it violates section 1201(b)(1). The “remove, deactivate or otherwise impair” language  
 16 provides *additional* grounds for liability. Regardless, the argument fails. The DVD

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17 <sup>6</sup> In fact, CSS protects multiple rights of copyright holders, including the public performance  
 18 right, 17 U.S.C. § 106(4), since a scrambled copy cannot be “publicly performed.”

19 <sup>7</sup> 321 also argues in a footnote that there is a “disputed question of fact” regarding “whether CSS  
 20 ‘effectively’ controls anything,” because certain CSS “keys” have been hacked. Opp. at 10 n.6.  
 21 Even if *all* CSS keys were public (which 321 does not claim), this argument ignores the statutory  
 22 definition: “[A] technological measure ‘effectively protects a right of a copyright owner under  
 23 this title’ if the measure, *in the ordinary course of its operation*, prevents, restricts, or otherwise  
 24 limits the exercise of a right of a copyright owner under this title.” § 1201(b)(2)(B) (emphasis  
 25 added). CSS is “effective” because, without circumventing the CSS encryption with 321's  
 26 software (or something similar), viewable copies of these DVDs cannot be made. Opp. at 3.  
 27 Whether CSS is the most powerful encryption or can be hacked is irrelevant to 321 Studios’  
 28 liability – if the only technological protection the statute was concerned with were those that  
 were not possible to circumvent, the statute would be meaningless. See Reimerdes, 111 F. Supp.  
 2d at 318 (such an interpretation would “gut the statute”). Thus, the lengthy portions of 321's  
 declarations directed to the “effectiveness” of CSS cannot prevent entry of summary judgment.  
Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (“Only disputes over facts that might  
 affect the outcome of the suit under the governing law will properly preclude the entry of  
 summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.”)

1 Circumvention Software "removes" CSS encryption when, as 321 admits, it creates new copies  
 2 of the Studios' works that *do not contain the CSS protections* embedded in the original copies.  
 3 Moore Decl. ¶ 10. Notwithstanding any supposed "copying protections" inserted by DVD X  
 4 Copy, these "circumvented" copies can be used to make additional copies.<sup>8</sup> Ultimately, the  
 5 indisputable fact that the DVD Circumvention Software "removes" the CSS protections from the  
 6 copyrighted work to permit copying is a violation of section 1201(b)(1).

7 **C. Prohibiting Technology That is Marketed For the Purpose Of Circumventing**  
 8 **Does Not Violate The First Amendment**

9 321's only defense to its violation of the "marketing" prohibition in sections  
 10 1201(a)(2)(c) and 1201 (b)(1)(c) is a one paragraph claim that the prohibition violates the First  
 11 Amendment. 321's argument fails for one overriding reason: the First Amendment does not  
 12 protect commercial speech that involves illegal activity. See Florida Bar v. Went for It, Inc., 515

13 <sup>8</sup> 321 does not claim that DVD Copy Plus has any "copying protections." As to DVD-X-Copy,  
 14 321's premise is incorrect, even accepting 321's plainly erroneous view that the DMCA would  
 15 permit trafficking in a circumvention technology as long as the technological measure *selected*  
 16 *by the copyright owner* that was circumvented was replaced with another technological measure  
 17 *selected by the trafficker*. It is undisputed that DVD-X-Copy enables multiple copying. The  
 18 "semaphore" placed by DVD-X-Copy on the copy of the decrypted DVD does not prevent  
 19 further copies from being made. Multiple first generation copies can be made from the original  
 20 DVD, *and* serial copies can be made from the decrypted DVD. See Schumann Decl. ¶ 6 ("plain  
 21 text, unencrypted copies made with DVD Copy Plus and DVD X Copy "can be further copied,  
 22 distributed or otherwise manipulated in the same manner as any other unprotected computer  
 23 files"); ¶ 37 ("Only DVD-X-Copy (and no other software) will recognize the 'marker' file.  
 24 Thus, once the CSS has been stripped from the DVD contents by operation of DVD-X-Copy,  
 25 any number of freely available software programs are able to, and will, make unlimited serial  
 26 copies of that content -- whether from the DVD-R or the computer hard drive copy -- without  
 27 any restrictions. I personally have confirmed this by making multiple copies of a DVD-R  
 28 originally made using DVD-X-Copy."). Additionally, the unencrypted copy that the DVD  
 Circumvention Software leaves on the user's computer hard drive can be moved before it is  
 erased, and used to burn further copies or transmit over the Internet. Schumann Decl. ¶ 14.  
 321's expert never once mentions these alleged "anti-piracy" features and the Moore Decl. does  
 not dispute Schumann's statements. Moore Decl. ¶ 17 ("digital semaphore" is read by 321's  
 software.) Similarly, the "indelible visible disclaimer" that 321 includes (and its touted ability to  
 trace "infringers" through a "watermark") does not prevent copying, and is a legally irrelevant  
 example of (attempting to) shut the barn door after the horse has left. See, e.g., RCA/Ariola  
International, Inc. v. Thomas & Grayston Co., 845 F.2d 773, 777 (8th Cir. 1988) (statement to  
 retailers employing defendant's machines, admonishing them "not to permit their employees to  
 take any part in the copying process," did not avoid vicarious liability).

U.S. 618, 623-24 (1995) (“[T]he government may freely regulate commercial speech that concerns unlawful activity.”); Pennsylvania Accessories Trade Ass’n, Inc. v. Thornburgh, 565 F. Supp. 1568, 1574 (M.D. Pa. 1983) (statute that “forbids ‘advertisement[s]’ that ‘promote the sale of objects designed or intended for use as drug paraphernalia’” does not violate the First Amendment because “the forbidden speech is commercial speech proposing an illegal transaction”). Since the DMCA prohibits marketing only unlawful circumvention technology, not (as 321 contends) any purportedly “legal attributes,” it does not violate the First Amendment.<sup>9</sup>

## II. POTENTIAL CONSUMER USES OF THE DVD CIRCUMVENTION SOFTWARE ARE IRRELEVANT

The lengthy argument that some of 321’s *customers* allegedly make non-infringing uses of the DVD Circumvention Software is irrelevant to 321’s liability. As discussed above, 321 violates sections 1201(a)(2) and 1201(b)(1) by “traffic[king],” “offer[ing] to the public,” and “manufactur[ing]” the DVD Circumvention Software. *There is no requirement that anyone ever buy the product or use it in any way.* In enacting sections 1201(a)(2) and 1201(b), Congress was concerned with developing a separate scheme for the particularized harm caused by trafficking in circumvention technologies, as distinct from any harm caused by user conduct. The DMCA follows that construct, clearly demarking the traffickers’ liability for circumvention (e.g., §§ 1201(a)(2), 1201(b)) from the users’ liability for infringement (e.g., 1201(a)(1); see also § 501). Cf., e.g., Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc., 192 F. Supp. 2d 321, 334 (“Video Pipeline should not be able to hide behind the lawful actions and privileges extended to its retailer customers who have abided by the Copyright Act.”); Princeton Univ. Press v. Michigan Document Servs., Inc., 99 F.3d 1381, 1389 (6th Cir.1996) (“courts have . . . properly rejected attempts by for-profit users to stand in the shoes of their customers making

<sup>9</sup> Because the cases cited by 321 involved lawful products, they are easily distinguishable. See Rubin v. Coors Brewing Company, 514 U.S. 476 (1995) (marketing of beer); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (marketing of liquor).

nonprofit or noncommercial uses”); Los Angeles News Serv. v. Tullo, 973 F.2d 791, 797 (9th Cir. 1992) (“the ultimate use to which the customer puts the tape is irrelevant”).

321’s invocation of section 1201(c), providing that the fair use defense to *copyright infringement* is unaffected by the prohibitions of section 1201, is another red herring. If Congress had intended “fair use” to be a defense to circumvention liability under sections 1201(a)(2) or 1201(b)(1) – it would have said so. Instead, it considered fair use implications of the DMCA and clearly and simply provided only that fair use remained a defense to copyright infringement by users. See Corley, 273 F.3d at 443 (Section 1201(c)(1) “simply clarifies that the DMCA targets the *circumvention* of digital walls guarding copyrighted material [and trafficking in circumvention tools], but does not concern itself with the *use* of those materials.”) (emphasis in original). The Court in Corley rejected this very argument when it was made by 321’s *amicus*, The Electronic Frontier Foundation (“EFF”). See EFF Brief, at 16-17:

“Subsection 1201(c)(1) ensures that the DMCA is not read to prohibit the ‘fair use’ of information just because that information was obtained in a manner made illegal by the DMCA. The Appellants’ much more expansive interpretation of Section 1201(c)(1) is not only outside the range of plausible readings of the provision, but is also clearly refuted by the statute’s legislative history.” Corley, 273 F.3d at 443-44.

The Elcom Court explained the issue further:

“Congress’ expressed intent to preserve the right of fair use is not inconsistent with a ban on trafficking in circumvention technologies, even those that could be used for fair use purposes rather than infringement. Fair use of a copyrighted work continues to be permitted, as does circumventing use restrictions for the purpose of engaging in a fair use, even though engaging in certain fair uses of digital works may be made more difficult if tools to circumvent use restrictions cannot readily be obtained.” 203 F. Supp. 2d at 1125.

Accordingly, “it is unlawful to traffic in tools that allow fair use circumvention.” Id. (emphasis added). Simply put, nothing in the language of section 1201(b) “would permit trafficking in devices designed to bypass use restrictions in order to enable a fair use, as opposed to an infringing use. ***The statute does not distinguish between devices based on the uses to which the device will be put.*** Instead, all tools that enable circumvention of use restrictions are



1 banned, not merely those use restrictions that prohibit infringement.” Id. at 1124 (emphasis  
2 added).

3 For this basic reason, the possible end-uses by 321 customers, to which 321 devotes  
4 much of its Opposition, simply are outside the purview of this Motion. In addition to being  
5 irrelevant to 321's liability, its arguments as to consumer uses are wrong or misplaced.

6 *First*, much of the end-user conduct discussed in 321’s Opposition has nothing to do with  
7 the CSS circumvention component of the DVD Circumvention Software because it is used to  
8 copy non-CSS protected works owned by users, e.g., home movies (Stier), instructional videos  
9 (Levitt, Gage) wedding videos (Yaciw), medical radiographs (Bevans), or works created by the  
10 users themselves (Piell).<sup>10</sup>

11 *Second*, ownership of a physical property (e.g., a DVD) has never conferred the right to  
12 copy the intellectual property embodied thereon (e.g., copyrighted motion pictures). 17 U.S.C.  
13 § 202 (ownership of copyright distinct from ownership of material object). And the making of a  
14 single copy is an infringement. MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511, 518  
15 (9th Cir. 1993). 321 quotes from Elcom on this issue, but neglects the language that immediately  
16 follows its quote:

17 “[T]he right to make a back-up copy of 'computer programs' is a  
18 statutory right, expressly enacted by Congress in Section 117(a),  
19 and there is as yet no generally recognized right to make a copy of  
a protected work, regardless of its format, for personal  
noncommercial use.” Elcom, 203 F. Supp.2d at 1135.

20 See also Atari, Inc. v. JS&A Group, Inc., 597 F. Supp. 5, 9-10 (N.D. Ill. 1983) (“Congress did  
21 not enact a general rule that making back-up copies of copyrighted works would not infringe.”)  
22

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23 <sup>10</sup> 321 has retreated from its initial claim that the sole purpose of its DVD Circumvention  
24 Software is “to permit legitimate owners to create archival copies of the DVDs they already  
25 own.” First Amended Complaint ¶ 26. 321 now admits that is not the case, (Opp. at 4-5, 12),  
26 and that its customers use its software for purposes such as making **additional** (not “archival”)   
27 copies for use in multiple locations (e.g., Hudson) or when traveling (e.g., Althaus, Good) or  
making “derivative” works (e.g., Goscha). Indeed, 321’s president recently proclaimed that  
“there’s absolutely nothing wrong with” making a copy of a DVD so a “friend” can have the  
DVD. <http://news.com.com/2008-1082-992985.html>.

1           *Third*, the **limited** exception of § 117 for making archival copies of computer programs  
 2 that 321 cites does not apply to the Studios' works. The works contained on the DVDs are not  
 3 computer programs. (Even 321's expert hedges in making this comparison. Touretzky Decl.  
 4 ¶ 41 (claiming "compelling similarities" between motion pictures and commercial software, and  
 5 that both "can be considered" software.)). They are "audiovisual works." 17 U.S.C. § 101.  
 6 ("Audiovisual works are works that consist of a series of related images which are intrinsically  
 7 intended to be shown by the use of machines or devices such as projectors, viewers, or electronic  
 8 equipment, together with accompanying sounds, if any, regardless of the nature of the material  
 9 objects, such as films or tapes, in which the works are embodied.") See, e.g., Atari, 597 F. Supp.  
 10 at 9-10 (Section 117 does not apply to computer programs contained within physical media, in  
 11 that case, video game cartridges). In fact, the limited, express exception codified in § 117  
 12 reconfirms that the making of other exact copies – "back up" or not – is **not** exempt and is  
 13 infringing.<sup>11</sup>

### 14 15 **III. 321'S FIRST AMENDMENT CHALLENGES TO THE DMCA ARE MERITLESS**

16           321 makes two First Amendment challenges to the DMCA. The first posits that  
 17 prohibiting trafficking in the DVD Circumvention Software "eliminates" the ability of **end-users**  
 18 to exercise supposed First Amendment rights with respect to the Studios' copyrighted works.  
 19 The second asserts that the anti-trafficking prohibitions impermissibly restrain 321's **own** alleged  
 20 First Amendment right to express itself. Neither challenge is a novel one; both were considered  
 21 and thoughtfully rejected, for good reason, by the Corley and Elcom courts. None of 321's  
 22 arguments justifies a departure from those decisions.

23  
24  
25  
26 <sup>11</sup> Vault v. Quaid Software Ltd., 847 F. 2d 255 (5th Cir. 1988) and RIAA v. Diamond  
 27 Multimedia Sys. Inc., 180 F. 3d 1072, 1079 (9th Cir. 1999), cited by 321, are not to the contrary.  
 28 The former was limited to the express exemption of § 117, and the latter to the exemption from  
 non-serial coping contained in the Audio Home Recording Act, 17 U.S.C. § 1001 *et. seq.*



1           A.     **321 Does Not Have Standing To Raise A First Amendment Challenge On**  
 2                 **Behalf Of Its Customers**

3           321 attempts to hide the issue of its standing to raise purported First Amendment rights of  
 4     third parties, relegating the subject to a one-sentence footnote. Opp. at 20, n.13. 321's  
 5     reluctance to address this threshold standing issue is understandable: it is a bedrock principle of  
 6     constitutional jurisprudence that "a person to whom a statute may constitutionally be applied will  
 7     not be heard to challenge that statute on the ground that it may conceivably be applied  
 8     unconstitutionally to others, in other situations not before the Court." Broadrick v. Oklahoma,  
 9     413 U.S. 601, 610 (1973). "A closely related principle is that constitutional rights are personal  
 10    and may not be asserted vicariously." Id. "These principles rest on more than the fussiness of  
 11    judges. They reflect the conviction that under our constitutional system courts are not roving  
 12    commissions assigned to pass judgment on the validity of the Nation's laws." Id. at 610-611.<sup>12</sup>

13           The single limited exception to this basic standing rule exists in the doctrine of  
 14    "overbreadth." See Hynes v. Mayor and Council of Borough of Oradell, 425 U.S. 610, 633  
 15    (1976) ("Broadrick recognized that it is *only* the application of the doctrine of 'overbreadth'  
 16    which sometimes permits limited exceptions to traditional rules of standing in the First  
 17    Amendment area.") (emphasis added). That doctrine permits litigants "to challenge a statute not  
 18    because their own rights of free expression are violated, but because of a judicial prediction or  
 19    assumption that the statute's very existence may cause others not before the court to refrain from  
 20    constitutionally protected speech or expression." Virginia v. American Booksellers Ass'n, Inc.,  
 21    484 U.S. 383, 392-93 (1988); Broadrick, 413 U.S. at 612.

22  
 23           <sup>12</sup> 321 clearly recognized the infirmity of its position. Under a now-deleted February 26, 2003,  
 24     website posting titled "*Do you want to be a Star?*," 321's president wrote: "321 Studios' law  
 25     firm (Keker & Van Nest) is looking for an actual user of the software to file a motion on behalf  
 26     of that user to intervene in our landmark fair use lawsuit. This will ensure that we are able to  
 27     assert the rights (First Amendment, fair use, etc.) of DVD owners and 321 customers in this  
 28     case." [http://dvdxcopy.afterdawn.com/thread](http://dvdxcopy.afterdawn.com/thread_view.cfm./24804) view cfm./24804. As this reply memorandum was  
 being drafted, one individual responded to the advertisement, moving to intervene. Regardless  
 of the outcome of his motion to intervene (which the Studios oppose), his involvement does not  
 confer standing on 321, nor alter the Studios' entitlement to summary judgment against 321.

1           However, 321 deliberately has avoided characterizing its First Amendment challenge as  
 2 an “overbreadth” attack. For good reason: “A facial freedom of speech attack must fail unless,  
 3 at a minimum, the challenged statute ‘is directed narrowly and specifically at expression or  
 4 conduct commonly associated with expression.’” Roulette v. City of Seattle, 97 F.3d 300, 305  
 5 (9th Cir. 1996), *quoting* City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 760  
 6 (1988). *See also* Elcom, 203 F. Supp. 2d at 1133 (“facial attacks on overbreadth grounds are  
 7 limited to situations in which the statute or regulation by its terms regulates spoken words or  
 8 expressive conduct.”). As the Elcom Court concluded, the DMCA is not “by its terms” (or at all)  
 9 directed “‘narrowly and specifically at expression or conduct commonly associated with  
 10 expression.’... Accordingly, an overbreadth facial challenge is not available.” 203 F. Supp. 2d at  
 11 1133.

12           In an effort to disguise what can only be an impermissible overbreadth challenge, 321  
 13 attempts to shoehorn itself into standing reserved for those whose very compliance with a  
 14 *facially discriminatory* statute would violate the *equal protection* rights of a third party.  
 15 Eisenstadt v. Baird, 405 U.S. 438, 443 (1972), and Craig v. Boren, 429 U.S. 190, 195 (1976), the  
 16 cases on which 321 relies, illustrate why the shoe doesn’t fit. Both involved statutes prohibiting  
 17 the plaintiff from distributing a product to certain categories of individuals, based on a  
 18 constitutionally impermissible criterion. *See* Craig, 429 U.S. at 195 (vendor entitled to challenge  
 19 statute prohibiting the sale of 3.2% beer to men but not women); Eisenstadt, 405 U.S. at 443  
 20 (vendor entitled to challenge statute that prohibited the sale of contraceptives to unmarried  
 21 individuals). Nothing in the application or the enforcement of the DMCA discriminates at all  
 22 among end-users; selling circumvention software to any and *all* end-users is illegal.<sup>13</sup>

23  
 24  
 25  
 26 <sup>13</sup> The only *First Amendment* standing case 321 cites is Virginia v. American Booksellers  
 27 Ass’n, 484 U.S. 383 (1988), which was decided on *overbreadth* grounds (which, as set forth  
 28 above, 321 cannot use to challenge the DMCA). The other First Amendment case cited by 321,  
Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972), did not address standing at all.

**B. In Any Event, Section 1201 Does Not Impermissibly Burden The First Amendment Rights Of Users of The DVD Circumvention Software**

Even if 321 had standing to assert the putative First Amendment rights of its users (which it does not), its arguments fail. Those arguments rest on a series of flimsy propositions, all of which already have been rejected by other courts, and none of which survives even the most rudimentary scrutiny: namely, that (1) prohibiting the sale of the DVD Circumvention Software “eliminates” fair use; (2) the “fair use” doctrine is a First Amendment right; and (3) the First Amendment right and the fair use affirmative defense are co-extensive, such that any purported burden on the ability to make (purported) “fair uses” of copyrighted works violates a user’s First Amendment rights.

## 1. The DMCA Does Not “Eliminate” Fair Use

321 does not (and cannot) contend that the DMCA places any statutory limitation on the ***type*** of conduct encompassed by the “fair use” defense (see 17 U.S.C. § 1201(c)(1) (“[n]othing in this section shall affect . . . defenses to copyright infringement, including fair use.”). Rather, 321’s First Amendment challenge theorizes that “to the extent that the DMCA bans the ***tools*** necessary to engage in fair use, it has eliminated fair use itself.” Opp. at 21 (emphasis added).<sup>14</sup>

321’s hyperbolic claim that prohibiting the DVD Circumvention Software “does away with fair use in the digital realm” (Opp. at 19) is unmitigated hogwash. “The DMCA does not impose even an arguable limitation on the opportunity to make a variety of traditional fair uses of DVD movies, such as commenting on their content, quoting excerpts from their screenplays, and

<sup>14</sup> 321 cites three cases – Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123 (1992), Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Comm’n, 518 U.S. 727 (1996), and Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) –for the proposition that prohibiting the dissemination of the DVD Circumvention Software is a “back door” regulation of speech. None of these cases has anything to do with prohibiting products that can be used in furtherance of purported speech rights. Each involved statutes that either ***directly*** regulated speech or First Amendment activity (Denver Area, 518 U.S. at 754-60 (regulation required cable broadcasters to “segregate and block” certain types of programming,)) or permitted a government entity to censor or discriminate against certain speech (Forsyth County, 505 U.S. at 133-34 (ordinance required county to assess parade fees based on content of parade); Bantam, 372 U.S. at 64 (law permitted a commission to list certain types of publications as “objectionable” and to require that distributors treat such publications differently)).

1 even recording portions of the video images and sounds on film or tape by pointing a camera, a  
 2 camcorder, or a microphone at a monitor as it displays the DVD movie.” Corley, 273 F.3d at  
 3 459. See also Elcom, 203 F. Supp. 2d at 1111 (“Congress has not banned or eliminated fair use  
 4 and nothing in the DMCA prevents anyone from quoting from a work or comparing texts for the  
 5 purpose of study or criticism.”).

6 The DMCA also allows ample additional breathing room for fair uses. It contains  
 7 express exemptions for nonprofit libraries, archives, and educational institutions; law  
 8 enforcement, intelligence and government activities; reverse engineering; encryption research;  
 9 and security testing. 17 U.S.C. §§ 1201(d)-(j). Cf. Eldred v. Ashcroft, 123 S. Ct. 769, 789  
 10 (2003) (noting that Copyright Term Extension Act contains explicit statutory “safeguards” for  
 11 “libraries, archives and similar institutions.”). As yet a further safeguard, section 1201(a)(1)(C)  
 12 provides for triennial rulemaking by the Library of Congress to determine “whether persons who  
 13 are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely  
 14 affected by the prohibition...in their ability to make noninfringing uses under this title of a  
 15 particular class of copyrighted works.” In fact, advocates of the position that CSS-encrypted  
 16 DVDs should be exempted from the DMCA’s prohibition on access-control circumvention  
 17 applied for such an exemption during the first triennial rulemaking. The Library of Congress,  
 18 after soliciting public comment and obtaining testimony from 50 groups, as well as nearly 400  
 19 written submissions, determined that “no such exemption was warranted.” DMCA Rulemaking  
 20 at 64557, 64569.

## 21 **2. Fair Use Is Not A Constitutional Right**

22 The doctrine of “fair use” is a *statutory defense* to an action for copyright infringement –  
 23 not a First Amendment “right” (or, indeed, any “right”). No case has ever held, as 321 asserts  
 24 without citation of authority, that the “fair use doctrine is the savings clause that renders the  
 25 copyright laws consistent with the First Amendment.” Opp at 21. See Corley, 273 F.3d at 458  
 26 (“Appellants contend that the DMCA, as applied by the District Court, unconstitutionally  
 27 eliminates ‘fair use’ of copyrighted materials. We reject this extravagant claim....[T]he  
 28

Supreme Court has never held that fair use is constitutionally required.”). (Citations to the record omitted).

Nothing in Eldred changes the analysis. See Opp. at 20. Eldred stands for nothing more than the unremarkable proposition that the “fair use” defense – like the idea/expression dichotomy and various other statutory provisions – accommodates First Amendment concerns. See Eldred, 123 S.Ct. at 789 (“In addition to spurring the creation and publication of new expression, copyright law contains built-in First Amendment accommodations....”). This uncontroversial (and longstanding) proposition is not equivalent to a holding that fair use is a constitutional “right.”<sup>15</sup>

### 3. “Fair Use” And The First Amendment Are Not Co-Extensive

321’s First Amendment argument is even narrower than the (untrue) claim that fair use is a constitutional right. Its First Amendment argument rests entirely upon a single *form* of alleged “fair use” – making an exact digital copy, in whole or in part, of a DVD. See Opp. at 21 (identifying “fair uses” as “excerpting clips for scholarship or critical reviews, creating instructional videos, incorporating movie clips into new video works, making backup copies of DVDs, and repairing scratched DVDs”). Tellingly, 321 never once argues that these particular forms of “fair use” are *First Amendment* uses. Rather, 321 engages in a sleight-of-hand, literally *replacing* its “First Amendment” discussion with a “fair use” discussion, so as to imply that *any* use that might be considered a “fair use” must be the equivalent of a First Amendment use. See, e.g., Opp., at 21-22. But there is no *First Amendment* right to make an exact copy. “There can be no First Amendment justification for the copying of expression along with idea

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<sup>15</sup> The only other case cited by 321 in support of its claim, Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 559 (1985), actually supports the *Studios’* position. The Supreme Court expressly rejected the suggestion that there existed a “First Amendment” exception to the Copyright Act. It instead found that copyright’s idea/expression dichotomy “[strikes] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.” 471 U.S. at 556 (internal cite and quotation omitted). The Court never once indicated that the doctrine of “fair use” might be a First Amendment right or even that the doctrine had its roots in the First Amendment.

1 simply because the copier lacks either the will or the time or energy to create his own  
 2 independently evolved expression. The first amendment guarantees the right to speak; it does  
 3 not offer a governmental subsidy for the speaker, and particularly a subsidy at the expense of  
 4 authors whose well-being is also a matter of public interest.” 1 Nimmer, § 1.10[D], at 1- 96-97.  
 5 Accord Zacchini v. Scripps-Howard Broadcasting Company, 433 U.S. 562, 573 (1977) (rejecting  
 6 First Amendment challenge to right of publicity statute: “we are quite sure that the First and  
 7 Fourteenth Amendments do not immunize the media when they broadcast a performer’s entire  
 8 act without his consent.”).

9 As the Second Circuit explained:

10 “We know of no authority for the proposition that fair use, as  
 11 protected by the Copyright Act, much less the Constitution,  
 12 guarantees copying by the optimum method or in the identical  
 13 format of the original. . . . The fact that the resulting copy will not  
 14 be as perfect or as manipulable as a digital copy obtained by having  
 15 direct access to the DVD movie in its digital form, provides no  
 16 basis for a claim of unconstitutional limitation of fair use. A film  
 critic making fair use of a movie by quoting selected lines of  
 dialogue has no constitutionally valid claim that the review (in  
 print or on television) would be technologically superior if the  
 reviewer had not been prevented from using a movie camera in the  
 theater, nor has an art student a valid constitutional claim to fair  
 use of a painting by photographing it in a museum.”

17 Corley, 273 F.3d at 459. See also Elcom, 203 F. Supp. 2d at 1133, n.4 (“There is no direct  
 18 authority for the proposition that the doctrine of fair use is coextensive with the First  
 19 Amendment, such that ‘fair use’ is a First Amendment right.”); DMCA Rulemaking at 64569  
 20 (“there is no unqualified right to access works on any particular machine or device of the user’s  
 21 choosing”).

22 Likewise, an author’s choice to disseminate his or her work in a particular format, or with  
 23 technological or other restrictions on the use of that work, does not raise First Amendment  
 24 problems. Inherent in the copyright monopoly is the copyright holder’s right to control his or her  
 25 creation: “It has always been a fundamental principle of copyright law that the copyright owner  
 26 has no obligation to make his work available to the public.... He may choose to keep it locked in  
 27 his office, or to provide access only upon certain terms. Regardless of this choice, the law can  
 28 make it illegal to break into his office, even if the ultimate object is to make a fair use of the



work.” Testimony of Marybeth Peters, Register of Copyrights, NII Copyright Protection Act of 1995, Joint Hearing Before Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary and the Senate Committee on the Judiciary, 104th Cong., 1st Sess., November 15, 1995 (U.S. Gov’t. Printing Office, 1996) [Ex. 2 to Request for Judicial Notice (“RJN”)], at 51. See also Harper & Row, 471 U.S. at 559 (“[F]reedom of thought and expression ‘includes both the right to speak freely and the right to refrain from speaking at all.’”), *citing* Wooley v. Maynard, 430 U.S. 705, 714 (1977); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1455 (7th Cir. 1996) (copyright owner may place restrictions on the use of the copyrighted work).<sup>16</sup>

In light of the foregoing, 321 cannot seriously contend (and does not) that there is a **First Amendment** right to make exact and complete copies of a DVD – including “backup” copies of a DVD to protect against the risk of damage from misuse or mishandling; or extra copies of DVDs for oneself or one’s family or friends; or “repairing” broken DVDs. But with the exception of a few users who claim to use the DVD Circumvention Software to copy **unencrypted** content for which they do not **need** or use the decryption technology,<sup>17</sup> **every single one** of the 210 users who completed 321’s form “declaration” claim to use the DVD Circumvention Software for these or similar purposes. This is precisely the type of “bodily appropriation” of the Studios’ copyrighted works that courts repeatedly have found do **not** implicate any First Amendment rights. Elcom, 203 F. Supp. 2d at 1135 (“There certainly has been no generally recognized First Amendment right to make back-up copies of electronic works. Thus, to the extent the DMCA impacts a lawful purchaser’s ‘right’ to make a back-up copy, or to space-shift that copy to

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<sup>16</sup> *Amici* Law Professors argue that the ability to make perfect digital copies of a DVD is essential to the exercise of “fair use” because “motion pictures incorporate images and sounds [and] direct copying of excerpts is the analogue to direct quotation.” Law Professors’ Brief, at 9. But none of the cases they cite stands for this sweeping proposition; each merely found that the particular uses claimed to be infringing were “fair uses” and did not give rise to liability. None of these cases had anything to do with the **format** of the allegedly taken work – much less whether making a particular **type** of copy was “essential” to the exercise of “fair use.” Nor did any of these cases have anything to do with any purported First Amendment “right” to make copies.

<sup>17</sup> Bevins, Durbin, Moffat, Monroe, Nakaoka, Rowthorn, Sink, and Yaciw.

another computer, the limited impairment of that one right does not significantly compromise or impair the First Amendment rights of users so as to render the DMCA unconstitutionally overbroad.”); Harper & Row, 471 U.S. at 557-58 (“[Respondent] possessed an unfettered right to use any factual information revealed in [the memoirs] for the purpose of enlightening its audience, but it can claim no need to ‘bodily appropriate’ [Mr. Ford’s] ‘expression’ of that information by utilizing portions of the actual [manuscript].”); Walt Disney Productions. v. Air Pirates, 581 F.2d 751, 759 (9th Cir. 1978) (rejecting First Amendment defense to copying of Plaintiffs’ copyrighted cartoon characters: “Because the defendants here could have expressed their theme without copying Disney’s protected expression...their First Amendment challenge be dismissed.”). Cf. Zacchini, 433 U.S. at 573 (no First Amendment privilege to broadcast a performer’s entire act).

**4. The DMCA Does Not Place An Impermissible “Financial Burden” On First Amendment Rights Of Third Parties.**

Positing that the Studios “may argue” that users can copy a DVD using a video camera (an example that actually comes from Corley, 273 F.3d at 459, not the Studios), 321 contends that this would place a “financial burden” on such users’ First Amendment rights. Opp. at 22. This argument is a red herring. As discussed above, there is no “First Amendment right” (and not even any fair use “right”) to make a particular form of copy or to copy from a particular medium. Nor do 321’s users need a video camera to make “fair uses” of the Studios’ copyrighted works: they are free to quote from the dialogue, criticize the work, or show the copyrighted work in a classroom for instructional purposes (to list just a few examples). That aside, 321’s argument grossly mischaracterizes the law. The only “financial burdens” on First Amendment rights that render a statute unconstitutional are those that “imposes a financial burden on speakers because of the *content* of their speech.” See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Board, 502 U.S. 105, 115 (1991) (emphasis added) (invalidating statute that forfeited the proceeds of publications pertaining to “the reenactment of a crime” or “the expression of [an] accused or convicted person’s thoughts, feelings, opinions or emotions regarding the crime”); Arkansas Writers’ Project, Inc. v. Ragland, 481 U.S. 221, 221



(1987) (invalidating tax that applied only to certain types of magazines, but exempted “religious, professional, trade, and sports journals”). Even assuming the DMCA placed a financial burden on a (non-existent) “First Amendment” right to make a copy, the alleged burden exists for *all* encrypted works, *irrespective* of the content. Hence the alleged “burden” cannot invalidate the statute.

##### 5. **The DMCA Does Not Impair Any Person’s Right To Access Non-Copyrighted Works**

A prohibition on trafficking in DVD Circumvention Software neither impairs the ability of consumers to access non-copyrighted works, nor “place[s] unlimited power in the hands of copyright holders to control information.” Opp. at 22. Even if, as 321 argues, the purchaser of a DVD has a right to use public domain material, that does not mean that the Studios (or anyone else) must provide it in any particular format or manner. The Elcom defendants made the identical argument, using the identical hyperbole, and citing the identical authority. The Court expressly rejected it:

“Assuming for the sake of argument that it would violate the First Amendment for the government to grant exclusive copyright-like rights in works that have already entered the public domain, that situation is not presented here. *The hole in defendant’s argument is that the DMCA does not grant anyone exclusive rights in public domain works or otherwise non-copyrighted expression.* A public domain work remains in the public domain. Any person may use the public domain work for any purpose – quoting, republishing, critiquing, comparing, or even making and selling copies. *Publishing the public domain work in an electronic format with technologically imposed restrictions on how that particular copy of the work may be used does not give the publisher any legally enforceable right to the expressive work, even if it allows the publisher to control that particular copy.*

203 F. Supp. 2d at 1134 (emphasis added). See also ProCD, 86 F.3d at 1455 (shrinkwrap license restricting use of software did not create any rights “equivalent” to copyright). There is no basis to depart from Elcom’s well-reasoned conclusion, and 321 offers none.

##### C. **Section 1201 Does Not Violate 321’s First Amendment Rights**

321’s second challenge to the DMCA is based on its own alleged First Amendment rights. This challenge is predicated on the erroneous premise that the DMCA is a content-based

1 restriction on speech and thus subject to the heightened (or “strict”) scrutiny applied to statutes  
 2 that discriminate against particular types of speech based on the speakers’ message. Opp. at 26.  
 3 That is not the case here.

4 **1. The DMCA Is Not A Content Based Restriction**

5 **a. The DMCA Regulates Circumvention Technology Because Of**  
 6 **Its Function, Not Its Expression.**

7 The level of First Amendment scrutiny accorded a statute depends on whether it is  
 8 content-based or content-neutral. 321 claims the DMCA is a content-based restriction because it  
 9 prohibits trafficking in *circumvention* technology and thus “cannot be articulated without  
 10 reference to the content of the speech that is banned.” Opp. at 27. Corley and Elcom expressly  
 11 rejected the same argument. See Corley, 273 F.3d at 454 (“[Defendants] argue that the [anti-  
 12 trafficking provisions of the DMCA] ‘specifically target...scientific expression based on the  
 13 particular topic addressed by that expression – namely, techniques for circumventing CSS.’ We  
 14 disagree.”) (Citations to the record omitted.); Elcom, 203 F. Supp. 2d at 1128 (rejecting  
 15 argument that “it is precisely the content of the code that causes the government to regulate it”).

16 Every court that has considered the issue has held that decryption technology contains  
 17 both functional and expressive elements.<sup>18</sup> See, e.g., Junger v. Daley, 209 F.3d 481, 484 (6th  
 18 Cir. 2000) (“[S]ource code has both an expressive feature and a functional feature.”); Corley,  
 19 273 F.3d at 451 (the “realities of what code is and what its normal functions are require a First  
 20 Amendment analysis that treats code as combining nonspeech and speech elements, *i.e.*,  
 21 functional and expressive elements.”).<sup>19</sup> Bernstein v. United States Dept. of State, 922 F. Supp.

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 23 <sup>18</sup> 321 makes the bogus claim that the extent to which computer code is functional (as opposed  
 24 to expressive) is a “factual” issue. Opp. at 29, n.24. But the issue is not the extent to which code  
 25 is functional; it is whether the statute regulates the function or the message. Elcom, 203 F. Supp.  
 26 2d at 1128. This is a legal, not a factual inquiry. See Junger, 209 F.3d at 485. In any event,  
 27 ***both*** sides have submitted evidence about what functions are performed by 321’s DVD  
 28 Circumvention Software, and that evidence is not in dispute. Compare Schumann Decl. ¶¶ 25,  
 26, 29, 31-35 with Touretzky Decl. ¶ 30 and Moore Decl. ¶¶ 3, 6.

<sup>19</sup> Contrary to the urging of *amicus* EFF, the function/expression distinction, and the application  
 of “intermediate scrutiny” to statutes regulating the functional elements of computer software, is

1 1426 (N.D. Cal. 1996), which 321 cites, is not to the contrary. Bernstein said only that the fact  
 2 that computer code has a functional element does not mean code is not speech – a proposition the  
 3 Studios do not challenge. Contrary to 321's assertion, Bernstein did not hold that “export  
 4 regulations prohibiting the dissemination of encryption software violated the First Amendment.”  
 5 Opp. at 28. The Court held only that the plaintiff had raised “a colorable” First Amendment  
 6 claim sufficient to survive a motion to dismiss for lack of justiciability. 922 F.Supp. at 1439  
 7 (“the Court at this stage of the proceedings need only determine whether the claim is colorable.”)

8 The distinction between function and expression is dispositive in determining whether a  
 9 statute is content-neutral. That is because in making that determination, courts look to whether  
 10 Congress enacted the statute “because of agreement or disagreement with the *message* it  
 11 conveys.” Elcom, 203 F. Supp. 2d at 1138 (emphasis added). See also City of Renton v.  
 12 Playtime Theaters, Inc., 475 U.S. 41, 48-49 (1986) (concern underlying content-based  
 13 restrictions is based on the principle that “government may not grant the use of a forum to people  
 14 whose views it finds acceptable, but deny use to those wishing to express less favored or more  
 15 controversial views.”).

16 The DMCA is not concerned with prohibiting any “message” (subversive or otherwise)  
 17 that might be conveyed by 321. The DMCA is directed solely to the function of circumvention  
 18 technologies. “The reason that Congress enacted the anti-trafficking provision of the DMCA had  
 19 nothing to do with suppressing particular ideas of computer programmers and everything to do  
 20 with *functionality*.” Reimerdes, 111 F. Supp. 2d at 329 (emphasis added). See also Elcom, 203  
 21 F. Supp. 2d at 1128 (“Here, the parties have pointed to no portion of the legislative history that  
 22 demonstrates a congressional intent to target speech because of its expressive content. Rather,  
 23 Congress sought ways to further electronic commerce and protect intellectual property rights,

24 \_\_\_\_\_  
 25 entirely consistent with First Amendment jurisprudence, and does not relegate certain types of  
 26 speech to “second class First Amendment citizenship.” In determining whether certain  
 27 regulations on speech are “content-based” or “content-neutral,” the Supreme Court long has  
 28 sanctioned the segregation of “expressive” elements of speech from “non-expressive” elements.  
 See e.g. United States v. O’Brien, 391 U.S. 367 (1968); Clark v. Community for Creative Non-  
Violence, 468 U.S. 288 (1984).

while at the same time protecting fair use.”). In other words, “Congress sought to ban the code not because of what the code *says*, but rather because of what the code *does*.” Elcom, 203 F. Supp. 2d at 1128.<sup>20</sup>

**b. Prohibiting “Trafficking” In The DVD Circumvention Software Is No More Content-Based Than Prohibiting Its Use**

321 struggles in vain to distinguish dissemination of computer code from its use, arguing that its dissemination of the software is “expressive” in nature. See Opp. at 29. This distinction is untenable. 321 never has contended (nor could it) that by transmitting or shipping its products to customers, it intends to impart a particular message or viewpoint – its goal is the sale, for profit, of its unlawful software products. That the sale may be carried out by words or that the product sold is computer code does not entitle it to First Amendment protection. See Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 456 (1978) (“It has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”); United States v. Mendelsohn, 896 F.2d 1183, 1185 (9th Cir. 1990); Corley, 273 F.3d at 454 (upholding DMCA as applied to “posting” DeCSS code on the internet: “Neither the

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<sup>20</sup> 321 claims the DMCA should be compared to the flag-desecration statute at issue in Texas v. Johnson, 491 U.S. 397, 404-05 (1989); the defamatory speech in Hustler Magazine v. Falwell, 485 U.S. 46, 52 (1988); or the parade regulations in Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 577-78 (1995). If anything, these cases are instructive because of their *contrast* to the function regulated by the DMCA. Each involved a content-based restriction on pure speech or, in the case of Johnson, purely symbolic conduct. Each of the regulations at issue sought to regulate the *specific message* communicated by the speaker. In Johnson, the statute prohibited the desecration of the flag -- the “very purpose” of which “is to serve as a symbol of our country” – “in a way that the actor knows will offend.” In Hurley and Hustler, the *only* “act” regulated was *the very expression itself* (Hustler’s parody “advertisement” mocking Jerry Falwell and the involvement of a gay and lesbian group in a parade). Johnson, 491 U.S. at 405. 321 also argues the DMCA should be compared to the sign ban in City of Ladue v. Gilleo, 512 U.S. 43 (1994) and the ban on solicitations in Riley v. Nat’l. Fed’n of the Blind, Inc., 487 U.S. 781 (1988) and Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980). City of Ladue had nothing to do with the separation of “function” and “expression.” That case belongs to the line of authority, not relevant here, that a prohibition that forecloses an entire method of communicating messages sweeps too broadly and is unconstitutional. 312 U.S. at 45-55. The DMCA does not foreclose any, let alone an entire, means of communicating a message. Riley and Schaumburg were direct prohibitions on pure speech and are equally inapposite.

DMCA nor the posting provision is concerned with whatever capacity DeCSS might have for conveying information to a human being.”); Karn v. United States Dept. of State, 925 F. Supp. 1, 10 (D.D.C. 1996) (“The defendants are not regulating the export of the diskette because of the expressive content of the comments and/or source code, but instead are regulating because of the belief that the combination of encryption source code on machine readable media will make it easier for foreign intelligence sources to encode their communications.”) See also United States v. Schulman, 817 F.2d 1355 (9th Cir. 1987) (no First Amendment defense for showing alien how to cross the border illegally).

c. **The DMCA Is Not A Content-Based Restriction On Expressive Conduct Justified By Its “Potential Consequences”**

Both 321 and *amicus* EFF argue that the DVD Circumvention Software cannot be regulated “on the basis of its potential consequences,” because the software “does not lead inexorably to copyright infringement.” Opp. at 29-30 & n.21; EFF Brief, at 14, 16. This argument is fundamentally flawed. Brandenburg v. Ohio, 395 U.S. 444 (1969) (cited by EFF), as well as every case cited by 321 for this proposition, involved restrictions on speech based entirely upon the *message* being communicated. These cases stand only for the proposition (not at issue here) that an otherwise *impermissible content-based* regulation does not become *permissibly content-neutral* merely because the regulation is justified by the potential consequences of the particular speech (e.g., “fighting words”).<sup>21</sup> For that reason, 321’s

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<sup>21</sup> See Forsyth County, 505 U.S. at 134 (parade ordinance permitted discrimination based on content of parade, even though county justified such discrimination on ground that certain types of parades carried greater risks of harm); Houston v. Hill, 482 U.S. 451, 462 (1987) (statute criminalized speech that “in any manner...interrupt[s] an officer”). American Booksellers Ass’n, Inc. v. Hudnut, 771 F.2d 323, 333 (7th Cir. 1985) (statute prohibited sale of speech that “subordinates” women but permitted speech that portrays women in positions of equality, “no matter how graphic the sexual content”); United States v. Poocha, 259 F.3d 1077, 1082 (9th Cir. 2001) (defendant could not be penalized for using profanity); Simon & Schuster, 502 U.S. at 117 (only speech relating to criminal acts was subject to statute); Regan v. Time, Inc., 468 U.S. 641, 648-59 (1984) (statute prohibited publishing photographs of currency, unless photographs were used “for philatelic, numismatic, educational, historical, or newsworthy purposes”); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 493-96 (1981) (statute prohibited posting of some signs, but not others, based on their message). Bartinicki v. Vopper, 532 U.S. 514 (2001), which 321 also cites for this point, is equally distinguishable. Bartinicki involved a regulation on “pure

hyperbolic claim that “there is a disputed issue of fact as to whether the availability of a program such as DVD-X-Copy will overbear the will of the citizenry and turn them into a lawless mob” (Opp. at 31), inadvertently misses or intentionally misstates the point. The DMCA does not regulate decryption technology because of the danger imposed by any *message* communicated by the prohibited technology, but because of its *functional capacity* for harm. Corley, 273 F.3d at 454; Elcom, 203 F. Supp. 2d at 1128. Thus, 321 is free to communicate whatever messages it wants concerning the undesirability of CSS or other encryption technology; it just may not traffic in technology that defeats it.

**D. The DMCA Meets “Intermediate Scrutiny”**

Because the DMCA is content-neutral, it is subject to “intermediate” scrutiny. Elcom, 203 F. Supp. 2d at 1129 (“the court concludes that intermediate scrutiny, rather than strict scrutiny, is the appropriate standard to apply.”); Corley, 273 F.3d at 454 (“[Section 1201] is . . . content-neutral, just as would be a restriction on trafficking in skeleton keys identified because of their capacity to unlock jail cells”); Junger, 209 F.3d at 485 (applying “intermediate” scrutiny to regulation on encryption source code). Under “intermediate scrutiny,” the test is whether (1) the regulation furthers “an important or substantial governmental interest” and (2) the means chosen do not “burden substantially more speech than is necessary to further the government’s legitimate interests.” Ward v. Rock Against Racism, 491 U.S. 781, 791, 799 (1989); see also Clark, 468 U.S. at 293; O’Brien, 391 U.S. at 377.

321 (and *amicus* EFF), citing but mischaracterizing the Supreme Court’s two decisions in Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622 (1994) (Turner I) and 520 U.S. 180 (1997) (Turner II), assert that the Studios must present (and the Court must consider) “substantial evidence” that these two elements are satisfied. Opp. at 23. In fact, whether the DMCA passes muster under “intermediate” scrutiny is not an evidentiary issue that requires the Studios to litigate, and the Court to act as a super-legislature to decide, the policy issues considered (and \_\_\_\_\_ speech” (532 U.S. at 526), and the “narrow holding” of the case was “limited to the special circumstances presented [t]here.” Id. at 535 (Breyer, J. concurring).



determined) by Congress. To the contrary, in reviewing the constitutionality of a statute, the Court's "sole obligation is 'to assure that, in formulating its judgments, **Congress** has drawn reasonable inferences based on substantial evidence.'" (emphasis added). Turner II, 520 U.S. at 195; Turner I, 512 U.S. at 664. In doing so, the Court "must accord **substantial deference** to the predictive judgments of Congress," and need not reweigh the evidence *de novo*, or...replace Congress' factual predictions with [its] own." Id. (emphasis added). The rationale for this rule is clear:

"Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable. As an institution, moreover, Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon an issue as complex and dynamic as that presented here....And Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review."

Turner I, at 665-66 (*quoting* Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 331 n.12 (1985)).<sup>22</sup> "This principle has special significance in cases, like this one, involving congressional judgments concerning regulatory schemes of inherent complexity and assessments about the likely interaction of industries undergoing rapid economic and technological change." Turner II, 520 U.S. at 196. Thus, "even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to Congress' findings as to harm to be avoided and to remedial measures adopted for that end, lest court infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy." Id. at 196.

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<sup>22</sup> The portion of Turner I on which 321 relies for the proposition that "factual findings concerning the actual effects of the regulations of protected speech were 'critical'" (Opp. at 23) is **not** the opinion of the Court. To the contrary, a majority of the Court did **not** join in that part of the opinion. More important, the "factual findings" about "the actual effects of the regulation" that 321 claims Turner I requires, were the findings of **Congress**.

1 Congress enacted the DMCA only after the development of a vast record over more than  
 2 five years (1993 - 1998). See S. Rep. 105-190, at 2-8. This record included:

- 3 • More than 1,500 pages of written comments from more than 150 individuals and  
 4 organizations. Id. at 3.
- 5 • Extensive hearings before the House and Senate Judiciary Committees and  
 6 intellectual property subcommittees, in which testimony was received from dozens of  
 7 individuals, including law professors; representatives of industries such as computer and  
 8 communications, consumer electronics, software, electrical and electronics engineers, and the  
 9 motion picture and recording industries; high-ranking government officials (including the  
 10 Register of Copyrights; the Assistant Secretary and Commissioner of Patents and Trademarks,  
 11 Department of Commerce; and the Assistant Director General of the World Intellectual Property  
 12 Organization); and non-profit organizations. Id. at 6.<sup>23</sup>
- 13 • The creation and development of a special task force “to investigate the effects of  
 14 emerging digital technology on intellectual property rights and make recommendations on any  
 15 appropriate changes to U.S. intellectual property law and policy.” Id. at 2. That task force  
 16 convened a special Conference on Fair Use “to explore the particularly complex issue of fair use  
 17 in a digital environment.” Id. at 3.

18 As set forth below, based on this enormous record and the evidence contained therein,  
 19 Congress justifiably concluded that the DMCA both furthers important governmental interests  
 20 and does not burden more speech than necessary to achieve that interest.

### 21 **1. The DMCA Furthers Important Governmental Interests**

22 As set forth in the Studios’ moving papers, Congress enacted the DMCA to address  
 23 significant public policy concerns, including “[p]romoting the continued growth and  
 24 development of electronic commerce,” H. Rep. No. 105-551 (II), at 23 (1998); “protecting  
 25 \_\_\_\_\_

26 <sup>23</sup> Among the evidence considered by Congress was testimony and statements from some of the  
 27 very same law professors who filed an *amicus* brief in support of 321. See, e.g., Hearings Before  
 28 Subcommittee on Courts and Intellectual Property, House Judiciary Committee, Sept. 16 & 17,  
 1997 (attaching statement from Pamela Samuelson) (RJN, ex. 4).



1 intellectual property rights,” *id.*; and encouraging the dissemination of intellectual property,  
 2 because “[d]ue to the ease with which digital works can be copied and distributed worldwide  
 3 virtually instantaneously, copyright owners will hesitate to make their works readily available on  
 4 the Internet without reasonable assurance that they will be protected against massive piracy.”  
 5 S. Rep. No. 105-190, at 8 (1998).<sup>24</sup>

6 Congress clearly determined, based on the substantial evidence before it, that “the recited  
 7 harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in  
 8 a direct and material way.” *Turner I*, 512 U.S. at 664. *See, e.g., Reimerdes*, 111 F. Supp. 2d at  
 9 335 n.230 (citing portions of Congressional record containing evidence that the cost of piracy to  
 10 affected copyright holders is between \$11 and \$20 billion each year; that in some countries  
 11 software piracy rates are as high as 97% of sales; and that “the effect of this volume of theft is  
 12 substantial: lost U.S. jobs, lost wages, lower tax revenue, and higher prices for honest purchasers  
 13 of copyrighted software.”); S. Rep. 105-190, at 10 (discussing importance of intellectual property  
 14 industries); H. Rep. 105-551(I), at 9 (“In order to protect the owner, copyrighted works will most  
 15 likely be encrypted and made available to consumers once payment is made for access to a copy  
 16 of the work. There will be those who will try to profit from the works of others by decoding the  
 17 encrypted codes protecting copyrighted works, or engaging in the business of providing devices  
 18 or services to enable others to do so.”); H. Rep. 105-551(II), at 25 (“the Committee...recognizes  
 19 that the digital environment poses a unique threat to the rights of copyright owners, and as such,  
 20 necessitates protection against devices that undermine copyright interests.”).<sup>25</sup>

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21  
 22 <sup>24</sup> 321 does not dispute that circumvention technology can be used to facilitate piracy of  
 23 copyrighted works, that without technological restrictions to prevent such piracy, copyright  
 24 holders would be reluctant to disseminate their works, and that absent the restrictions of the  
 DMCA, the availability to the public of circumvention technology will be increased. *See Karn*,  
 925 F. Supp. at 12.

25 <sup>25</sup> Examination of even a tiny portion of the Congressional record, in addition to that cited in the  
 26 text, reveals the substantiality of the evidence considered by Congress. *See, e.g.,* Statement of  
 27 Sen. Hatch, *National Information Infrastructure Copyright Protection Act*, Hearing Before  
 28 Committee on the Judiciary, United States Senate, 104th Cong., 2d Sess., May 7, 1996 (U.S.  
 Gov’t. Printing Office, 1997) (“May 7, 1996 Senate Hearings”) [RJN, Ex. 3], at 2 (noting that  
 content providers are holding back from making works available on digital format); Statement of

321's argument that applying the DMCA against *its* product will not advance a governmental interest (even if assumed *arguendo* to be accurate) is entirely beside the point. See Opp. at 23. "The First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception *in the particular case* will not threaten important governmental interests." United States v. Albertini, 472 U.S. 675, 688 (1985) (emphasis added). See also Clark, 468 U.S. at 296-97 ("[I]t is evident from our cases that the validity of this regulation need not be judged solely by reference to the demonstration at hand.").<sup>26</sup>

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Kenneth Kay, Executive Director, Creative Incentive Coalition, May 7, 1996, Senate Hearings, at 8-10, 11-13 (noting the importance of the copyright industries, the cost of piracy, the ready availability of pirated works, and the need for copyright owners to "place their copyrighted works in protective envelopes."); Statement of Bruce Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, WIPO Copyright Treaties Implementation Act, Hearing Before the Subcomm. on Courts and Intellectual Property of the Comm. of the Judiciary, House of Representatives, 105th Cong., 1st Sess., Sept. 16 & 17, 1997 (U.S. Gov't. Printing Office, 1997) ("Sept. 16 & 17, 1997, House Hearings") [RJN, Ex. 4], at 34-40 (discussing importance of DMCA); Statement of Marybeth Peters, Register of Copyrights, Sept. 16 & 17, 1997, House Hearings, at 45-49 ("Peters Testimony") (discussing need for anticircumvention provisions); Statement of Robert Holleyman, Business Software Alliance, Sept. 16 & 17, 1997, House Hearings, at 69-77 (piracy costs software industries \$11.2 billion in sales every year; software in digital form is susceptible to piracy; and "without a specific provision prohibiting circumvention of technological means used to prevent unauthorized acts, authors will be increasingly weary of making their works available through electronic networks."); Testimony of Rep. Ros-Lehtinen, Intellectual Property Rights: The Music and Film Industry, Hearing Before the Subcommittee on International Economic Policy and Trade of the Committee on International Relations of the House of Representatives, 105th Cong., 2d Sess., May 21, 1998 (U.S. Govt. Printing Office 1998) ("May 21, 1998, Hearings") [RJN, Ex. 5], at 1-4 (copyright sector is largest exporter and accounts for over 3.6% of gross domestic product; piracy cost copyright owners \$425 million in 1998); Testimony of Bruce Lehman, May 21, 1998 Hearings, at 14-15 (discussing need for technological protection to protect against international piracy); Statement of Bonnie Richardson, May 21, 1998, Hearings, at 47-52 (discussing international piracy and need for anti-circumvention laws); Executive Summary, Economists, Inc., May 21, 1998 Hearings, at 70-72 (outlining importance of intellectual property industries to U.S. economy). See also Request for Judicial Notice ("RJN"), Exs. 2 - 5.

<sup>26</sup> 321's argument that the DMCA does not serve important governmental interests because "DeCSS, which lacks the serial copy protections of DVD X Copy, is still widely available on the Internet" (Opp. at 24) has been expressly rejected by at least one court. See Karn, 925 F. Supp. at 11 (rejecting claim that O'Brien test is not satisfied because the cryptographic algorithms contained on plaintiff's diskette are "already widely available in other countries [through the

## 2. The DMCA Is Sufficiently Narrowly Tailored

As a threshold matter, 321's claim that the DMCA is overly "restrictive" fails because it is constructed entirely on the erroneous premises that the DMCA "eliminates" or otherwise burdens fair use, and that fair use is a First Amendment right. As discussed above, neither fair use in general – nor making an exact digital copy in particular – is a First Amendment right (nor any "right" at all), and thus any "burden" on such uses is not a burden on the First Amendment.<sup>27</sup>

That aside, the Studios are not required to prove that the DMCA is the "least restrictive means of accomplishing the governmental objective." Corley, 273 F.3d at 455. See also Ward, 491 U.S. at 798 (the regulation "need not be the least restrictive or least intrusive means of [serving a legitimate, content-neutral purpose]."); Elcom, 203 F. Supp. 2d at 1132 ("Under intermediate scrutiny, it is not necessary that the government select the least restrictive means of achieving its legitimate governmental interest."). Nor is the Court required to evaluate the DMCA against the various hypothetical alternatives proposed by 321 or *amicus*. Opp. at 24; EFF Brief, at 11-13. See Clark, 468 U.S. at 299 (upholding, against First Amendment challenge, a "no-camping" law with respect to national parklands: "We are unmoved by the Court of Appeals' view that the challenged regulation is unnecessary, and hence invalid, because there are less speech-restrictive alternatives that could have satisfied the Government interest in preserving park lands.... We do not believe, however, that either [O'Brien] or the time, place, or manner decisions assign to the judiciary the authority to replace the Park Service as the manager

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Internet and other sources] or are so 'weak' that they can be broken by the [National Security Agency].") The argument is unsupportable in any event, since it would mean that as soon as one "cracks" and disseminates an encryption code, the previous Government interest in stopping circumvention of access and copying protection ceases.

<sup>27</sup> Although EFF suggests that the prohibition on circumvention tools "would burden scientific speech, especially in the area of computer security" (EFF Brief at 10), it does not (and cannot) explain why. The DMCA not only exempts legitimate encryption research from the anti-circumvention proscriptions, but it also allows researchers to develop and use technological measures (i.e., circumvention tools) to perform good faith encryption research, and to provide those tools to others who are collaborating in or verifying that good faith research. 17 U.S.C. §§ 1201(g)(2), (4).

1 of the Nation's parks or endow the judiciary with the competence to judge how much protection  
 2 of park lands is wise and how that level of conservation is to be attained."); Albertini, 472 U.S. at  
 3 689 ("Nor are such regulations invalid simply because there is some imaginable alternative that  
 4 might be less burdensome on speech.").

5 "[T]he requirement of narrow tailoring is satisfied 'so long as the...regulation promotes a  
 6 substantial governmental interest that would be achieved less effectively absent the regulation.'  
 7 Ward, 491 U.S. at 798-99. See also One World One Family Now v. City and County of  
 8 Honolulu, 76 F.3d 1009, 1013-14 (9th Cir. 1996). "Without the ban on trafficking in  
 9 circumvention tools, the government's interest in promoting electronic commerce, preserving the  
 10 rights of copyright holders, and preventing piracy would be undermined. The absence of  
 11 effective technological restrictions to prevent copyright infringement would inevitably result in  
 12 even more rampant piracy, with a corresponding likely decrease in the willingness of authors and  
 13 owners of copyrighted works to produce them in digital form or make the works available on-  
 14 line." Elcom, 203 F. Supp. 2d at 1130. See also Id. at 1132 ("[T]he DMCA does not burden  
 15 substantially more speech than is necessary to achieve the government's asserted goals of  
 16 promoting electronic commerce, protecting copyrights, and preventing electronic piracy.")

17 Both 321 and EFF err in asserting that Congress failed to consider "the efficacy and  
 18 availability of constitutionally acceptable less restrictive means" Opp. at 25; EFF Brief at 10.  
 19 Congress *did* consider – and rejected – the very alternatives proposed by 321 and EFF. As the  
 20 Register of Copyrights explained to Congress:

21 "After an extensive analysis, the Copyright Office has concluded  
 22 that existing protections under U.S. law are insufficient to satisfy  
 23 the treaty obligation. In making this determination, the Copyright  
 24 Office examined a number of existing bodies of law. These  
 25 included the doctrine of contributory infringement under copyright  
 26 law, and a variety of federal statutes including the Audio Home  
 27 Recording Act, 17 U.S.C. § 1002, the Communications Act, 47  
 28 U.S.C. §§ 553 and 605, the National Stolen Property Act, 18  
 U.S.C. § 2314, the Electronic Communications Privacy Act, 18  
 U.S.C. § 2510 and the Computer Fraud and Abuse, 18 U.S.C.  
 § 1030 . . . We do not believe that the doctrine of contributory  
 infringement provides sufficient protection to fulfill the treaty  
 obligation to provide 'adequate legal protection and effective legal

remedies' against circumvention.... Most devices for circumventing technological measures, even those designed or entirely used for infringing purposes, will be capable of substantial noninfringing uses since they could potentially be employed in the course of a fair use, or in the use of a public domain work. It is therefore not surprising that the Sony standard, in practice, has been ineffective in addressing the circumvention problem.... Copyright, moreover, may not afford any recourse against those who engage in acts of circumvention alone. . . . Some of the other laws we considered address particular aspects of circumvention of particular types of technological protection measures such as the scrambling of broadcast signals. In the aggregate, however, they fail to provide the general coverage required by the treaties.”

Peters Testimony, September 16 & 17, 1997, House Hearings, at 46-47 (Ex. 4 to RJN).

Congress' rationale for rejecting those alternatives was sound: “Because of the difficulty involved in discovering and obtaining meaningful relief from individuals who engage in acts of circumvention, a broader prohibition extending to those in the business of providing the means for circumvention appears to be necessary to make the protection adequate and effective.” Id., at

48. See also Elcom, 203 F. Supp. 2d at 1132:

“In addition, the alternatives proposed by defendant – enacting more severe penalties for copyright infringement – may not be as effective at preventing widespread copyright infringement and electronic piracy as is banning the trafficking in or the marketing of the tools that allow piracy to thrive. Congress certainly could have approached the problem by targeting the infringers, rather than those who traffic in the tools that enable the infringement to occur. However, it is already unlawful to infringe, yet piracy of intellectual property has reached epidemic proportions. Pirates are world-wide, and locating and prosecuting each could be both impossible and ineffective, as new pirates arrive on the scene. But, pirates and other infringers require tools in order to bypass the technological measures that protect against unlawful copying. Thus, targeting the tool sellers is a reasoned, and reasonably tailored, approach to ‘remedying the evil’ targeted by Congress. In addition, because tools that circumvent copyright protection measures for the purpose of allowing fair use can also be used to enable infringement, it is reasonably necessary to ban the sale of all circumvention tools in order to achieve the objectives of preventing widespread copyright infringement and electronic piracy in digital media. Banning the sale of all circumvention tools thus does not substantially burden more speech than is necessary.”<sup>28</sup>

<sup>28</sup> In 1999, the penalties for infringement were increased by Congress to a maximum of \$150,000 per (willful) infringement. 17 U.S.C. § 504(c). Yet, in the digital age, massive

321 and EFF further err in suggesting that Congress did not consider the impact of the DMCA on the fair uses 321 claims are implicated by that statute. Although that analysis was constitutionally unnecessary since “fair use” is not a First Amendment right, Congress did so exhaustively. See, e.g., H. Rep. 105-551(II), at 25-26 (discussing balance in DMCA between protection and fair use); Peters Testimony, September 16 & 17, 1997, House Hearings, at 48-50 (discussing provisions in DMCA designed to balance protection with fair use and other traditional copyright limitations); Hollyman Testimony, at 74 (discussing need for a balanced approach to promote interests of authors, users, and customers); Letter, Sept. 16, 1997, September 16 & 17, 1997, House Hearings, at 154-56 (expressing concern by law professors about chilling effect of DMCA); Statement of Rep. Rick Boucher, Sept. 16 & 17, 1997, House Hearings, at 193 (expressing concern about fair use). It was precisely because of those concerns that Congress not only enacted the specific exemptions of §§ 1201 (c)-(g), but also delayed for two years the effective date of section 1201(a)(1) to allow the Library of Congress to “examine” what adverse effects the circumvention prohibition might have. DMCA Rulemaking, at 64558. The Library of Congress found, after a two-year review of extensive testimony and written submissions, that “the existence of technological measures that control access to motion pictures on DVDs has not had a significant adverse impact on the availability of those works to the public.” Id. at 64569. Further, under its triennial rulemaking authority, the Library of Congress continues to review the “adverse impact” issues, including some of the very arguments made by *amicus* here. 17 U.S.C. § 1201 (a)(1)(C).

Finally, 321 suggests that “Congress’ different, and significantly less restrictive, treatment of a highly similar problem” -- namely, unidentified “burglar tool statutes” and the Audio Home Recording Act, and 17 USC § 1309(b) -- means that the DMCA is not narrowly-tailored. *Opp.* at 24-25. But the DMCA *was* modeled after existing legislation, including “black box” decryption legislation enacted both as part of the Telecommunications Act and NAFTA.

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infringement by countless, anonymous individuals continues to exist precisely because such penalties do not provide a solution. See Reimerdes, 111 F. Supp. 2d at 315 (describing viral distribution of digital copies).



1 See S. Rep. 105-190, at 11. However, even if this were not the case, failing to adopt the same  
 2 approach as another statute would not render the DMCA unconstitutional because the  
 3 government “must be allowed a reasonable opportunity to experiment with solutions to  
 4 admittedly serious problems.” Renton, 475 U.S. at 52 (“Nor is our holding [that a zoning  
 5 ordinance meets intermediate scrutiny] affected by the fact that Seattle ultimately chose a  
 6 different method of adult theater zoning that that chosen by Renton.”).

7 **E. 321’s Remaining Overbreadth Challenge Is Meritless**

8 321 makes a perfunctory argument that the DMCA is “substantially overbroad” on its  
 9 face. As set forth above, the DMCA cannot be challenged for overbreadth. See Roulette, 97  
 10 F.3d at 305; Elcom, 203 F. Supp. 2d at 1133. In any event, 321’s overbreadth argument is  
 11 meritless for the reasons set forth at page 16 of the Brief of Intervenor United States.

12  
 13 **IV. THE DMCA WAS PROPER UNDER THE COMMERCE CLAUSE**

14 321 wrongly asserts that “[n]either the text nor the legislative history of the DMCA  
 15 indicates which power Congress relied on.” Opp. at 34. Congress made clear that the DMCA  
 16 was enacted pursuant to its Commerce Clause authority. See H. Rep. No. 105-551(II), at 35  
 17 (“Constitutional Authority Statement: ...[T]he Committee finds that the Constitutional authority  
 18 for this legislation is provided in Article I, section 8, clause 3, which grants Congress the power  
 19 to regulate commerce with foreign nations, among the several States, and with the Indian  
 20 tribes.”). Therefore, 321’s extensive discussions of the Intellectual Property Clause and the  
 21 Necessary and Proper Clause are irrelevant. See Elcom, 203 F. Supp. 2d at 1138-1142  
 22 (Congress did not exceed its Commerce Clause authority in enacting the DMCA).

23 321 does not dispute that the activity regulated by § 1201 -- trafficking in circumvention  
 24 technology -- “substantially affects” interstate commerce and thus properly is the subject of the  
 25 Commerce Clause. See United States v. Lopez, 514 U.S. 549, 560 (1995); see also Trade-mark  
 26 Cases, 100 U.S. 82, 86 (1879) (“Commerce is a term of the largest import. It comprehends  
 27 intercourse for the purposes of trade in any and all its forms, including transportation, purchase,  
 28 sale, and exchange of commodities...” ). Instead, 321 (and *amici* professors) argues that such an



1 exercise of Commerce Clause authority was improper because the DMCA is “inconsistent” with  
 2 the Copyright Clause in two ways: (1) it “extend[s] exclusive protection to public domain or  
 3 copyright-expired subject matter” (Opp. at 37; Brief of Law Professors at 12); and (2) it  
 4 “eliminate[s] fair use of copyrighted expression.” (*Id.*) These arguments are meritless.<sup>29</sup>

5 Preliminarily, whether or not “legislation reaches beyond the limits of one grant of  
 6 legislative power has no bearing on whether it can be sustained under another.” *United States v.*  
 7 *Moghadam*, 175 F.3d 1269, 1276 (11th Cir. 1999). “The various grants of legislative authority  
 8 contained in the Constitution stand alone and must be independently analyzed. In other words,  
 9 each of the powers of Congress is alternative to all of the other powers, and what cannot be done  
 10 under one of them may very well be doable under another.” *Id.* Only laws that are  
 11 “***fundamentally inconsistent***” with another grant of Congressional power – in other words, laws  
 12 which Congress is “positively forbidden” to pass – run afoul of the Constitution. *Id.* at 1280.

13 Nothing in the DMCA is inconsistent with limitations on Congressional power under the  
 14 Intellectual Property clause – much less “fundamentally inconsistent.” As discussed above, the  
 15 DMCA neither “eliminates” nor otherwise affects rights afforded by (or limited by) the  
 16 Copyright Act, including the “fair use” of copyrighted works. *See* 17 U.S.C. § 1201(c). The  
 17 DMCA also does not grant the Studios any rights in public domain or otherwise uncopyrightable  
 18 works. *See Elcom*, 203 F. Supp. 2d at 1141 (rejecting claim that DMCA eliminates fair use or  
 19 grants rights in public domain works); *supra* at III. B. 5.

20 Nor does the DMCA conflict with the “limited times” provision of the Copyright Clause.  
 21 The DMCA prohibits circumvention of controls placed on *particular copies* of a copyrighted  
 22 work purchased by consumers. It does not affect rights in the underlying copyrighted material –  
 23 much less extend any such rights in perpetuity. *See Aronson v. Quick Point Pencil Co.*, 440 U.S.

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24  
 25 <sup>29</sup> As a variant on these arguments, *amici* Law Professors contend that the DMCA prohibits  
 26 reverse engineering to achieve interoperability, and thus impermissibly grants “private  
 27 monopolization of the unpatented technical standards.” Brief of Law Professors at 10. This  
 28 argument fails for two reasons. First, 321 does not contend that it reverse engineered CSS, let  
 alone that it did so to achieve interoperability, and thus the argument is irrelevant. Second, the  
 DMCA expressly authorizes reverse engineering to achieve interoperability. 17 U.S.C § 1201(f).

257, 264 (1979) (enforcement of royalty agreement after patent entered public domain was not inconsistent with “limited times” clause because “enforcement of the agreement does not withdraw any idea from the public domain.”); ProCD, 86 F.3d at 1455 (“shrinkwrap” license restricting the use of computer database containing telephone directory information did not “withdraw any information from the public domain...Everyone remains free to copy and disseminate all 3,000 telephone books that have been incorporated into ProCD’s database.”); Elcom, 203 F. Supp. 2d at 1141:

“[T]he DMCA does not allow a copyright owner to effectively prevent an ebook from ever entering the public domain, despite the expiration of the copyright...The publisher/copyright owner has no right to prevent any user from using the work any way the user prefers... The essence of a copyright is the legally enforceable exclusive rights to reproduce and distribute copies of an original work of authorship, to make derivative works, and to perform the work publicly, for a limited period of time. (Citations omitted.) None of those rights is extended beyond the statutory term merely by prohibiting the trafficking in or marketing of devices primarily designed to circumvent use restrictions on works in electronic form.”

The anti-circumvention provisions of the DMCA not only are entirely *consistent* with the purposes and goals of the Copyright Clause, they *further* those goals: “Protecting the exclusive rights granted to copyright owners against unlawful piracy by preventing trafficking in tools that would enable widespread piracy and unlawful infringement is consistent with the purpose of the Intellectual Property Clause’s grant to Congress of the power to ‘promote the useful arts and sciences’ by granting exclusive rights to authors in their writings.” Elcom, 203 F. Supp. 2d at 1140-41. See also Moghadam, 175 F.3d at 1280 (anti-bootlegging statute “further the purpose of the Copyright Clause to promote the progress of the useful arts.”); DMCA Rulemaking at 64568, n.13 (finding that “the availability of access control measures has resulted in *greater* availability of these materials” [referring to ancillary material on DVDs such as “outtakes, interviews with actors and directors, language features, etc.”]) (emphasis added).<sup>30</sup>

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<sup>30</sup> 321 and *amici* law professors make much of *dicta* in Moghadam that raised the issue (but declined to decide) whether the anti-bootlegging statute is consistent with the “limited times” clause. 175 F. 3d at 1281. To the extent that anything in the opinion could be read to suggest an inconsistency, it is not an inconsistency that exists in the DMCA. The anti-bootlegging statute in

V. **MISUSE IS NOT A DEFENSE**

Misuse is a potential defense only to copyright infringement claims, which the Studios do not allege. Opp. at 40, n.34 (“the Studios have not alleged that 321 or its customers have engaged in any copyright infringement”). See Practice Management Information Corp. v. American Medical Assn., 121 F.3d 516, 520 (9th Cir. 1997) (“misuse is a defense to copyright infringement”); Pollstar v. Gigmania, Ltd., 170 F. Supp. 2d 974, 982 (E.D. Cal. 2000) (“the court need not decide whether there was copyright misuse because Plaintiff does not allege copyright infringement”); Costar Group, Inc. v. Loopnet, Inc., 164 F. Supp. 2d 688, 708 (D.Md. 2001) (“Misuse of copyright is an affirmative defense to a claim of copyright infringement”); see also Lexmark Int’l, v. Static Control Components, Inc., Civ. No. 02-571 (KSF), Order at 38 (E.D. Ky. February 27, 2003) (“[t]he misuse defense, while often asserted, has rarely been upheld as a defense to a claim of copyright infringement”), Ex. 1 to RJN. 321 does not cite any authority supporting a theory of “Section 1201 misuse,” because no such authority exists. This is true because *Section 1201 does not grant an intellectual property monopoly*. See, e.g., Sony Computer Entertainment America, Inc. v. Gamemasters, 87 F. Supp. 2d 976, 988-89 (N.D. Cal. 1999) (rejecting misuse defense where plaintiff’s claims were directed toward defendant’s device that allowed “users to play non-authorized, non-territory video games by circumventing the PlayStation’s built in controls,” because plaintiff’s claims were “based upon a sound construction of the Digital Millennium Copyright Act”); Lexmark, at 38-39 (rejecting misuse defense, because “Lexmark is not seeking to improperly extend its copyright monopoly. Lexmark is simply attempting to . . . protect access to, its copyrighted computer programs. . . .

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Moghadam granted exclusive rights in the underlying intellectual property (performances); the DMCA does not create *any* rights in *any* intellectual property.

Lexmark's efforts to enforce the rights conferred to it under the DMCA cannot be considered an unlawful act undertaken to stifle competition").<sup>31</sup>

Additionally, a "section 1201 misuse" defense (if it did exist at all), necessarily would fail as a matter of law because CSS is licensed and controlled by DVD CCA, a nonprofit organization, not by the Studios. See Moore Decl., ¶ 10 ("the CSS system is administered and controlled by the Copyright Control Authority"); First Amended Complaint ¶ 23; Pavlovich v. Superior Court, 29 Cal. 4th 262 (2002); Reimerdes, 111 F. Supp. 2d at 310. ("As the motion picture companies did not themselves develop CSS and, in any case, are not in the business of making DVD players and drives, the technology for making compliant devices, i.e., devices with CSS keys, had to be licensed to consumer electronics manufacturers.")<sup>32</sup>

## VI. THE STUDIOS HAVE STANDING TO ASSERT A CLAIM UNDER THE DMCA

After rushing to this Court alleging that "an actual, present and justifiable controversy has arisen" because the Studios threatened to sue it (Complaint ¶¶ 41, 42), 321 now claims that the Studios lack standing even to *assert* a claim. This Motion seeks summary judgment on 321's amended complaint *and* on the Studios' counterclaim. Putting aside 321's illogic, the Studios have alleged the injury required by section 1203(a). See Counterclaim ¶¶ 53, 86. The Studios, which rely on CSS to protect their copyrighted works, plainly have standing to assert a claim for trafficking in products that circumvent that protection; the Studios are precisely the category of parties that the DMCA was designed to protect. See Federal Election Comm'n v. Akins, 524 U.S. 11, 18-19 (1998) (standing is conferred on those within the "zone of interests" protected by the statute). The Studios are enjoined by the mere fact of 321's trafficking in the DVD Circumvention Software; to establish standing under Section 1201, need not show that an end-

<sup>31</sup> Although irrelevant and without foundation, each of the examples of alleged "misuse" cited by 321 were DVDs not made or sold by the Studios or (in one case) a copyrighted motion picture, where allegedly a few seconds of stock footage was used. (Moore Decl. ¶ 33).

<sup>32</sup> 321 and *amicus* EFF apparently claim that "region coding" and "other restrictions" are "onerous." That is not misuse. It also is not accurate. This claim was considered and rejected by the copyright office. See Rulemaking, at 64569.

1 user actually ever used the device. See CSC Holdings, Inc. v. Greenleaf Electronics, Inc., Case  
 2 No. 99-C-7249, 2000 WL 715601, \*6 (N.D. Ill., June 2, 2000) (plaintiff had standing to assert  
 3 DMCA claim without a showing that any end-user ever actually used the circumvention device  
 4 to gain illegal access to plaintiff's encrypted cable pay-per-view programming).<sup>33</sup> In any event,  
 5 the record is replete with examples of the use of 321's product to circumvent the CSS encryption  
 6 that protects the Studios' motion pictures. See, e.g., Opp. at 4-5 (citing declarations of users who  
 7 copy DVDs for such things as inserting clips from popular films into "training tapes" and  
 8 "artistic works").

## 10 **VII. THE STUDIOS ARE ENTITLED TO A PERMANENT INJUNCTION**

11 321 contends that to obtain a permanent injunction, the Studios must show 321's liability  
 12 and a likelihood of irreparable harm in the absence of an injunction. Here, once liability is  
 13 established, irreparable harm is *presumed*. Universal City Studios, Inc. v. Reimerdes, 82 F.  
 14 Supp. 2d 211, 214 (S.D.N.Y. 2000) (applying presumption of irreparable harm to violation of  
 15 DMCA); Gamemasters, 87 F. Supp. 2d at 988 (applying presumption of irreparable harm to  
 16 DMCA claims: "where the movant has demonstrated a likelihood of success upon the merits of  
 17 its intellectual property claims, irreparable injury is to be presumed."); Lexmark, at 48 ("a  
 18 plaintiff that demonstrates a likelihood of success on the merits of its claim for violation of the  
 19 anti-trafficking provisions of the [DMCA] is entitled to a presumption of irreparable injury.").

20 321's assertion that the Studios are not entitled to the presumption of irreparable harm  
 21 because they "have not presented any evidence of [copyright] *infringement*" (Opp. at 40) misses  
 22 the point. The Studios' injury arises from the very act of trafficking in circumvention

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23  
 24 <sup>33</sup> 321's reliance on the (astounding) speculation that "it is entirely possible that [the DVD  
 25 Circumvention Software] in fact cause[s] a net benefit to Defendants" is misplaced. Opp. at 40.  
 26 The injury that gives the Studios standing arises from the act of 321's *trafficking* in  
 27 circumvention technology – not "downstream" uses. Further, 321 Studios cannot defeat standing  
 28 merely by *contesting* the existence of injury. Realnetworks, Inc. v. Streambox, Inc., 2000 WL  
 127311, \*6 (W.D. Wash. 2000) ("The court finds that RealNetworks has standing to pursue  
 DMCA claims under 17 U.S.C. § 1203, which affords standing to 'any person' *allegedly* injured  
 by a violation of sections 1201 and 1202 of the DMCA.") (emphasis added).

1 technology, without reference to any uses made of the DVD Circumvention Software. 321 is  
 2 continuing to, and unless enjoined will continue to “upgrade” its DVD Circumvention Software  
 3 and sell it to large numbers of users. That act of trafficking in and of itself threatens irreparable  
 4 harm by rendering the Studios’ access and use control technology obsolete and allowing the  
 5 Studios’ copyrighted works to become available in unprotected format. See Reimerdes, 82 F.  
 6 Supp.2d at 225-26. (“[t]here is little room for doubting that broad dissemination of DeCSS  
 7 would seriously injure or destroy plaintiffs’ ability to distribute their copyrighted products on  
 8 DVDs and, for that matter, undermine their ability to sell their products to the ‘home video’  
 9 market in other forms”). Accordingly, the rationale for the presumption of irreparable harm to  
 10 copyright infringement is as compelling – if not *more* compelling – in the DMCA context:

11 “Copyright infringement is presumed to give rise to [irreparable  
 12 harm]. In this case, plaintiffs do not allege that defendants have  
 13 infringed their copyrights, but rather that defendants offer  
 14 technology that circumvents their copyright protection system and  
 15 thus facilitates infringement. For purposes of the irreparable injury  
 16 inquiry, this is a distinction without a difference. If plaintiffs are  
 17 correct on the merits, they face substantially the same immediate  
 and irreparable injury from defendants’ posting of DeCSS as they  
 would if defendants were infringing directly. Moreover, just as in  
 the case of direct copyright infringement, the extent of the harm  
 plaintiffs will suffer as a result of defendants’ alleged activities  
 cannot readily be measured, suggesting that the injury truly would  
 be irreparable.” Reimerdes, 82 F. Supp. 2d at 215.

18 See also Lexmark, at 48 (“The damages incurred by violations of Section 1201(a)(2) of the  
 19 [DMCA] . . . “cannot readily be measured, suggesting that the injury truly is irreparable.”). For  
 20 these reasons, 321 also cannot and does not dispute that legal remedies are inadequate. See CSC  
 21 Holdings, at \*7 (enjoining sale of “pirate” cable decoders because “[a]ny adequate remedy for  
 22 Plaintiff would necessarily have to include equitable relief that would prevent Defendants from  
 23 selling additional ‘pirate’ decoder boxes in the future.”).<sup>34</sup>

24 \_\_\_\_\_  
 25 <sup>34</sup> *Amicus* EFF argues, citing Madsen v. Women’s Health Center, Inc., 512 U.S. 753 (1994)  
 26 (*upholding* reasonable restraints on antiabortion protesting) that an injunction preventing the  
 27 dissemination of the DVD Circumvention Software is an impermissible “prior restraint” because  
 28 it is insufficiently “narrowly tailored.” 321 Studios does not advance this argument, for good  
 reason. “The classic prior restraint cases were dramatically different from this one...The fact  
 that there may be some expressive content in the code should not obscure the fact that its  
 predominant character is no more expressive than an automobile ignition key. . . . Hence, those

**Conclusion**

For all of the reasons set forth herein and in the Studios' and Intervenor's other filings, the Studios' motion should be granted.

Respectfully submitted,

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of the traditional rationales for the prior restraint doctrine that relate to inhibiting the transmission and receipt of ideas are of attenuated relevance here....” Reimerdes, 82 F. Supp.2d at 225-26. See also Cable/Home Communication Corp. v. Network Productions, Inc., 902 F.2d 829, 849 (11th Cir. 1990) (rejecting First Amendment defense to injunctive relief).